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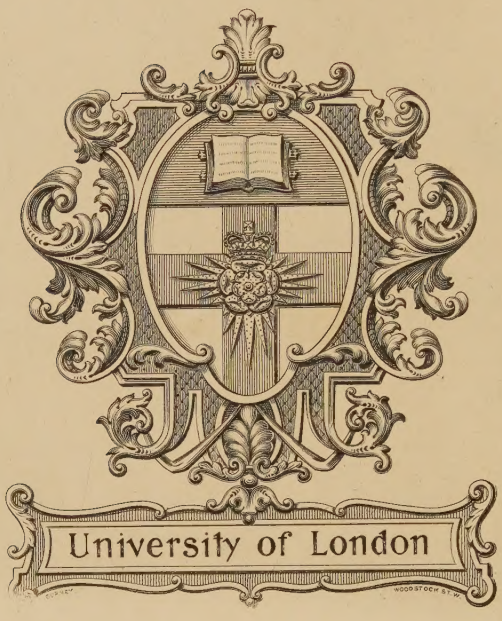

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DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

[IN THE COURT OF APPEAL.]

C. A.
1913
Oct. 14.

IN THE ESTATE OF JULIAN BERNARD HALL, DECEASED.

HALL *v.* KNIGHT AND BAXTER.

Probate—Legatee convicted of Manslaughter of Testator—Forfeiture of Right to take under Will—Public Policy.

The principle according to which a person who is guilty of feloniously killing another cannot take any benefit under that other person's will is based on public policy, and applies equally to a case of manslaughter as to one of murder.

A legatee who had been convicted of the manslaughter of her testator was held to be rightly dismissed from an action for probate of the will.

Cleaver v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147, followed.

Such an order may properly be made upon an interlocutory proceeding.

Dyson v. *Attorney-General* [1911] 1 K. B. 410, distinguished.

APPEAL from a decision of the President of the Probate, Divorce and Admiralty Division.

C. A. 1913

HALL, IN THE ESTATE OF. HALL v. KNIGHT AND BAXTER.

Julian Bernard Hall died on April 15, 1913, and on April 22 his executor P. S. B. Hall commenced an action in the Probate Division in which he propounded a will dated August 14, 1912, and made Ada Knight defendant. It was alleged that the testator had executed three other wills, one dated November 2, 1912, under which Jean Baxter, the present appellant, was the sole beneficiary; another dated December 4, 1912, by which the testator left all his property to be divided equally between Ada Knight and Jean Baxter; and the last dated April 14, 1913, under which Jean Baxter took no interest.

On April 28, 1913, pursuant to an order of Bargrave Deane J., Jean Baxter was added as a defendant to the action.

On May 27, 1913, Jean Baxter was convicted of the manslaughter of the testator, and on June 23, 1913, she unsuccessfully appealed against her conviction.

On July 18, 1913, the plaintiff took out a summons before the registrar to dismiss Jean Baxter from the action on the ground that she having been convicted of the manslaughter of the testator could take no beneficial interest under his will. The registrar dismissed the summons, and the plaintiff appealed. The appeal came on in chambers on July 28 before the President, who adjourned it into Court. On July 31, 1913, it was heard in Court by the President, who held that a person who had been found guilty of feloniously killing another was not entitled to take any benefit under that other person's will. He accordingly dismissed Jean Baxter from the action and gave leave to appeal.

Jean Baxter appealed.

J. P. Valetta and *Donald Corrie*, for the appellant. There is no authority for striking out the beneficiary from the proceedings in this case. She is not disabled by the provisions of s. 15 of the Wills Act from taking under the will, and there is no statutory authority for the order appealed against. This is not a case of contract like those arising under policies of life insurance. It is said that no person who is guilty of the manslaughter of another can take under that other person's will. But there are various degrees of manslaughter. Take the case of a person who while driving a motor car runs over and kills another; there

would be nothing contrary to public policy in allowing the driver to take a benefit under the will of the person whose death he has unwittingly caused, although the circumstances might amount to manslaughter. The decision appealed from amounts to the revival of forfeiture for felony or corruption of blood, which was abolished by the Felony Act, 1870 (33 & 34 Vict. c. 23), s. 1.

The rule laid down by the President embraces every case where the death of a testator has been occasioned by a beneficiary under his will. *Cleaver* v. *Mutual Reserve Fund Life Association* (1), which will be relied upon against our contention, was a case of murder.

[COZENS-HARDY M.R. The application of the doctrine is not limited to a case of murder.]

It should not be extended at any rate, and the Court will consider whether there was any intent. Here it has been proved that there was no intent to kill.

[HAMILTON L.J. In *Cleaver's Case* Lopes L.J. (2) lays it down that the principle of public policy would prevent the wife from reaping benefit from her crime.]

The submission is that *Cleaver's Case* (1), being a case of murder, is distinguishable.

In the Estate of Crippen (3) was a case of the exercise of discretion to grant administration under the Probate Act, 1857, s. 73.

[COZENS-HARDY M.R. There the learned President said, at p. 112, "The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence."]

That was obiter dictum; s. 73 was alone considered there. The proposition laid down by the learned President is far too wide and cannot be supported.

At any rate the question of law ought not to be concluded against the appellant in limine: *Dyson* v. *Attorney-General.* (4) See particularly the judgment of Fletcher Moulton L.J. at p. 418.

Barnard, K.C., and *Bayford*, for the respondents. The order under appeal was rightly made. Jean Baxter cannot take any interest under the will of the testator and has been properly excluded from the proceedings. Sect. 15 of the Wills Act has no

(1) [1892] 1 Q. B. 147.
(2) Ibid. at p. 160.
(3) [1911] P. 108.
(4) [1911] 1 K. B. 410.

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application. Neither does the Felony Act, 1870, apply. This case is covered by *Cleaver* v. *Mutual Reserve Fund Life Association*. (1) Fry L.J. in stating the principle there was dealing with all crimes. He said: "No system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person." That case was followed by the President in *Crippen's Case* (2), where he correctly stated the principle.

[SWINFEN EADY L.J. In *Fauntleroy's Case, The Amicable Society* v. *Bolland* (3), the crime was forgery.]

If would be a great injustice if the appellant were to be allowed to take part in these proceedings and cause expense to the estate, when she cannot under any circumstances take any interest under the will.

Valetta in reply.

COZENS-HARDY M.R. This is an appeal from a decision of the President raising a point which, but for authorities which I think are binding on us, might have required consideration on our part, but having listened to the argument, I have no doubt that the decision of the President was perfectly correct.

The material facts are these. The testator met with his death in April of this year. A will was propounded shortly after the death, and there are four scripts which are in existence, some one or more of which may have a right to be treated as the will. The present appellant, Jean Baxter, claims either the whole of the estate under one of those wills or half of the estate under another of those wills, but under the last will she takes nothing. The death of the testator was due to the act of Jean Baxter. That is a fact which has been proved and is now incontestable. She was found guilty of occasioning the death, and a verdict of manslaughter was given. The case was taken to the Court of Criminal Appeal and the decision was upheld, and therefore that is a fact which is conclusively proved. What is the consequence of that? After the probate proceedings were commenced, and before conviction, she was added as a defendant to the proceedings,

(1) [1892] 1 Q. B. 147. (2) [1911] P. 108.
(3) (1830) 4 Bli. (N.S.) 194.

and was properly so added. After the conviction an application was make to strike her out of the proceedings, and to that application the President acceded.

Now on what ground is that based? It has been argued by Mr. Valetta that there is no statute which deprives this lady of her right to attend the proceedings and to assert her title. It is true that she is a felon, he says, but look at s. 15 of the Wills Act, and you will not find that she is in the class of persons who are disabled from taking under a will. That statute seems to me to have nothing whatever to do with this case. That only provides that certain persons cannot take under a will although the persons whose disability prevents them from taking may be interested to prove the existence of the will. That does not apply to this case.

In this case, according to the authorities to which I am about to refer, the question seems to be plainly based upon public policy. You do not look for public policy, in the sense in which that expression is used, in an Act of Parliament. It is something which is really part of the common law of the land and does not depend upon statute. I think, if it were necessary, the decision of the House of Lords in *Fauntleroy's Case* (1) really covers this, but I do not think it necessary to go back to that, because in my view the decision of this Court in *Cleaver's Case* (2) plainly and distinctly covers this case. That was a case where murder was committed and an action was brought under a policy by the executors of the murdered man, the benefit of the policy going to the murderess, his wife. In the circumstances of that case the Court held that the executors might recover, but the Court would not go into the question of how the executors would have to deal with the money when it was got in; but all three members of the Court, Lord Esher, Fry L.J., and Lopes L.J., laid down the law in terms which to my mind plainly cover this case. It is true that that was a case of contract. Lord Esher said: "No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity"; and he says again: "If, in consequence

(1) 4 Bli. (N.S.) 194. (2) [1892] 1 Q. B. 147.

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of the death of the insured having been caused by the crime of a person in whose favour the policy is expressed to be made, or to or upon whom the policy money is left by will or settled, such person is not entitled to insist on its being paid to him, but he nevertheless claims the money from the executors, they may then vouch the doctrine of public policy, and say that by reason of it such person has forfeited his or her right to the money." That is what Lord Esher said. Fry L.J. is, if possible, more distinct: "The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony." Lopes L.J. expresses the same view: "I do not doubt that the principle of public policy would prevent the wife from recovering the amount of the policy money from them and so reaping benefit from her crime; because no trust can be enforced which contravenes the law." It is said that that was a case of murder and not manslaughter. I entirely fail to appreciate that distinction. It was a case of felony and I see no reason to draw a distinction between murder and manslaughter in a case like this. The authority of *Cleaver's Case* (1) is sufficient for this Court and is binding upon us, even if we felt any difficulty in following it, which I am bound to say I do not. Then again in *Crippen's Case* (2), before the learned President, he merely asserted the doctrine that is laid down in the other case: "It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence." I think it would be shocking if Jean Baxter, who was the cause of the death of this man, and was convicted of felony in respect of that, could come before the Court and claim an interest under any will made in her favour by the

(1) [1892] 1 Q. B. 147. (2) [1911] P. 108.

testator; that being so, it is plain that by a matter subsequent, namely, a conviction, that which was right in the first instance, making her a party to the action, is no longer right, and that it is quite proper to stay proceedings against her.

Then it is said that this is not a matter for decision upon an interlocutory proceeding. I cannot follow that. If there were any possibility of a question as to whether Jean Baxter had been guilty of the crime, that would be a matter which ought to have been tried in Court, but when the fact is perfectly indisputable and beyond contest, I know nothing whatever which prevents the Court, in a case of this kind, dealing with what is a pure question of law on an application to stay proceedings. There is certainly nothing in *Dyson's Case* (1) which lends any colour to the suggestion that this decision of the President was one which ought to have been disposed of at the trial of the action. In my opinion the appeal fails and must be dismissed.

HAMILTON L.J. I agree. The order discharging Jean Baxter was properly made at this stage, and the case of *Dyson* v. *Attorney-General* (1) I think is irrelevant.

On the main question *Cleaver's Case* (2) binds our judgment. All the members of the Court express their decision on this part of the case in terms as applicable to murder as to manslaughter. True that was a case of murder, but I do not think that, by using terms wide enough to cover manslaughter, the members of the Court supposed themselves to be speaking obiter, or were in fact doing so. The principle can only be expressed in that wide form. It is that a man shall not slay his benefactor and thereby take his bounty; and I cannot understand why a distinction should be drawn between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter. Why should the legatee be excluded from taking the bounty when he can be hanged, and not be excluded when he can only be sent to penal servitude for life? The distinction seems to me either to rely unduly upon legal classification, or else to encourage what, I am sure, would be very noxious—a sentimental speculation as to the motives and degree of moral guilt

(1) [1911] 1 K. B. 410. (2) [1892] 1 Q. B. 147.

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of a person who has been justly convicted and sent to prison. I think, therefore, that the principle as laid down in *Cleaver's Case* (1) applies and binds us, and that the appeal should be dismissed.

SWINFEN EADY L.J. I agree. Jean Baxter has been convicted of manslaughter and, as I gather, has been sentenced to penal servitude. The death of the testator directly resulted from the crime of Jean Baxter, and the question which arises in this appeal is, Can she benefit by that crime? In my opinion, the case is completely governed by *Cleaver* v. *Mutual Reserve Fund Life Association.* (1) In that case there was a policy effected for the benefit of a married woman. The result of the proceedings was that, although the insurance company had to pay to the executors the amount of the policy money, the trust in favour of the married woman was treated as non-existent, as if that clause had been struck out of the policy; and the money was held in trust for her husband's executors as if the trust in favour of the wife had never been inserted in the policy at all.

I am of opinion that the estate of the testator must go in the same way as if there were no benefit given to Jean Baxter by the will and that she cannot in any way benefit from the crime which she has committed. I see no reason for restricting the rule to cases of murder. It was pointed out during the course of the argument that in *Fauntleroy's Case* (2), where the same principle was applied by the House of Lords, although Fauntleroy was executed, the crime of which he was guilty was not murder, but forgery. In my opinion, the reasons given by the Lord Chancellor in *Fauntleroy's Case* (2), and the reasons given by the Court of Appeal in *Cleaver's Case* (1), completely govern us. It is against public policy that a person committing a crime should directly benefit in the way that it is claimed that Jean Baxter should benefit.

Appeal dismissed.

Solicitor for appellant: *J. K. Torkington.*
Solicitors for respondent: *Hasties.*

(1) [1892] 1 Q. B. 147. (2) 4 Bli. (N.S.) 194.

G. A. S.

[IN THE COURT OF APPEAL.]

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[1912 Folio 182.]

Admiralty—Damage to Cargo—Breach of Contract—Through Bill of Lading—Transhipment — Unseaworthy Lighter—"Shipper's Risk" — "Ship's Expense"—Shipowner's Liability.

The plaintiffs shipped a parcel of machinery at New York on board the defendants' steamship to be carried to Hull, and there transhipped into another of the defendants' steamships, or other company's steamship, for carriage from Hull to Norrköping in Sweden. The through bill of lading contained, amongst other conditions, the following:—"To be delivered in like good order and condition at the port of Hull. To be thence transhipped at ship's expense and shipper's risk to the port of Norrköping." "It is mutually agreed that the carrier shall have liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods. That the carrier shall not be liable . . . . for risk of craft, hulk, or transhipment," and "The goods are subject to any further clauses in the bills of lading in use by the route beyond Hull and the liability of each carrier is limited to its own line."

The goods arrived in good order by the defendants' steamship at Hull, and were there placed in a lighter whilst waiting to be transhipped to another of the defendants' steamships for conveyance to Norrköping. The lighter proved to be unseaworthy and sank with the plaintiffs' goods:—

Held by the Court of Appeal (Lord Parker of Waddington, Lord Sumner, and Warrington J.), affirming the decision of Bargrave Deane J., that the defendants were liable to make good to the plaintiffs the loss they had sustained by the sinking of the lighter through unseaworthiness, the question being one of the construction of the through bill of lading, and the words "at shipper's risk" referred to other risks than that of a breach of the fundamental obligation of the shipowner in respect of seaworthiness.

Appeal by defendants, Thomas Wilson, Sons & Co., Limited, against a decision of Bargrave Deane J. in favour of the respondents (plaintiffs), the owners of cargo lately laden on board the steamship *Galileo*.

The case is reported on the question of the construction to be placed on the words "at shipper's risk" in a through bill of lading which provided for the transhipment of goods at an intermediate stage by lighter, and the lighter proved to be unseaworthy, with the consequent loss of the goods.

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The material facts fully appear from the following considered judgment delivered in the Court below on March 17, 1913, by—

BARGRAVE DEANE J. This is an action brought by the International Harvester Company of America, who seek to recover damages from Messrs. Thomas Wilson & Sons, Limited, of Hull, for breach of contract to carry and deliver certain parcels of machinery from New York to Norrköping in Sweden.

The machinery was duly delivered on board the defendants' steamer, the *Galileo*, at New York, and bills of lading in respect of the same were signed by Messrs. Sanderson & Son, Messrs. Thomas Wilson & Sons' agents for the master, and handed to the plaintiffs and dated September 27, 1911. The defendants are the well-known firm of shipowners of Hull, who have a fleet of steamships trading between Hull in this country and various parts of the world. The steamship *Galileo* trades between New York and Hull, and it was recognized by the contracting parties that the goods would be carried in the *Galileo* to Hull and there transhipped into another steamship of the defendants for carriage from Hull to a port in Sweden. Accordingly, the bills of lading, which were in identical terms (except as to the particulars of the goods), contained, amongst other conditions, the following:— "To be delivered in like good order and condition at the port of Hull. To be thence transhipped at ship's expense and shipper's risk to the port of Norrköping." "It is mutually agreed that the carrier shall have liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods. That the carrier shall not be liable . . . . for risk of craft, hulk, or transhipment," and by clause 20 "The goods are subject to any further clauses in the bills of lading in use by the route beyond Hull and the liability of each carrier is limited to its own line."

The *Galileo* safely arrived at Hull with the goods in sound condition, and Messrs. Thomas Wilson & Sons arranged that they should be taken out into a lighter and be transhipped by means of the lighter to another of their steamships to carry them from Hull to Norrköping.

The lighter "No. 72" was engaged from a firm trading as the

Hull Keel and Lighter Company, and was in charge of a lighterman who has stated before me that he took the lighter alongside the *Galileo* in the Alexandra Dock at Hull, and on Saturday, October 13, he loaded into her from the *Galileo* twenty tons of the plaintiffs' goods; that he left her at noon on that day; that he did not go to her on Sunday, October 14; that on Monday, October 15, he went to her at 6 A.M., tried her pumps and found her free from water, and on that day loaded into her thirty more tons of the goods, making fifty in all; that this cargo was all put into the after part of the lighter, which then had a draught of 8 feet aft and 3 feet forward; that he then moved her away from the side of the *Galileo* and left her three or four lighters away amongst other lighters. He said the basin was full of lighters, "hundreds of them"; that on Tuesday morning, October 16, he went back to her and found her in the same place, tried her pumps and found her free from water, made her fast to a lighter, *W. F. Flowers*, and left her about 6 P.M.; that on Wednesday morning he went to the place where he had left her the night before, but could not find her; found the *W. F. Flowers* 200 yards away from the place where he had left her the night before, and saw the broken moorings of "No. 72" hanging from her. After searching in the basin he found—100 yards from where he had left her, the "No. 72," the night before—wreckage which was attached by a tarpaulin to the "No. 72" sunk at the bottom of the basin.

A diver proved that he was employed to go down to the sunken lighter and found that some of her cargo was out of her at the bottom of the basin, and it is not disputed that the water and mud which got into this machinery of the plaintiffs seriously damaged it, and that is the damage for which the plaintiffs are claiming compensation in this action.

The "No. 72" was subsequently raised and taken out of the basin and beached, and the diver says that by the direction of the salvage contractor he searched for the cause of her sinking and found—in her port quarter 20 feet from her stern post and 4 feet down from her rail—a hole 6 inches long and $2\frac{1}{2}$ inches wide partly in two planks, a jagged hole; that he smoothed this jagged hole with a chisel and plugged it with

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a piece of wood to make it watertight; that he saw no other hole or injury; that he bored some holes in her bilges to let the water out, then plugged them when it had run out; he put a patch over the wound, and she was then brought to the premises of Messrs. George Henry Brown to be examined and repaired in dry dock.

A good deal of evidence was given as to what was found upon this examination. The plaintiffs' counsel called a surveyor, who stated that he saw an oval hole forward of the hole plugged by the diver and pricked it with a pen-knife and found the plank quite rotten. Other witnesses for the defendants denied this and said that the hole he spoke to was not there until the surveyor made it with his knife.

In my opinion the conflict of evidence between these various witnesses as to this oval hole and how it came there is a matter which I need not consider in this case, as it is perfectly clear that the hole found and plugged by the diver was upon the evidence admittedly sufficient to let the water in and sink the lighter, and for the purposes of this case I find that it was owing to that hole that the "No. 72" sank and the damage was caused.

The repairer said to me that, assuming the lighter was drawing 8 feet aft, the hole was 6 to 9 inches below that water line.

It was suggested on behalf of the defendants that the hole might have been made by the stroke of a propeller, or by the rudder bolt of a steamer, or by the fluke of an anchor, but there was no direct evidence of how it was caused.

It was stated in evidence that it was not usual to leave any one in charge of a lighter in the basin at night when not at work. It was stated in evidence that one of the defendants' steamers, the *Cicero*, came into the basin that night, but although the hearing was adjourned to enable the claim to be amended alleging that the *Cicero* came in contact with the lighter and it was so alleged on amendment, no evidence was given affirmatively by the plaintiffs or negatively by the defendants as to that allegation. There was no evidence to contradict the statement of the lighterman in charge of "No. 72," that the place where

she was found sunk was 100 yards from where he had left her safely fastened up the night before, and there was no contradiction of the statement by the same witness that the basin was full of lighters, and it was also proved that many men and lighters were at work that night in the basin.

The next question which I have to consider is the condition of "No. 72" at the time these goods were put on board of her.

The plaintiffs' surveyor says that the two planks where this hole was were rotten, that they had a hard skin but were rotten behind. Another witness called by the plaintiffs was present at the survey, who had had experience in his father's business as a barge owner, and he said the planking was rotten. A retired shipbuilder and ship and barge repairer, with forty-seven years' experience, but who did not see "No. 72," said that in his experience a barge after fourteen to eighteen years' usage required a breeching of oak 1¼ inches thick to be cased on her, and sometimes the planks renewing, and that the seams widen through constant caulking, and that on looking at the account of the repairs done after this barge was raised he found that over 100 feet of new planking had been put into her.

The manager and secretary of the Hull Keel and Lighter Company said that "No. 72" was twenty years old; that he saw the surveyor picking at the rent in the planks with his knife and the knife brought part of the shell of the plank away; that the outside shell of the planks was half an inch thick and hard but brittle, and the wood at the back of the shell was not sound.

The repairer said that the plank was slightly decayed; that the plank was good outside but defective near the hole; and that he took out and renewed 15 feet of the plank from 6 or 7 feet forward of the hole to the after butt in the stern post.

Another witness, who saw the "No. 72" when she was beached, said that the hole was jagged as if it had been forced in.

The defendants' surveyor, who saw "No. 72," said that the wood was sound for half an inch, and inside beginning to decay; that he agreed with the plaintiffs' surveyor that the wood was going. Another witness who attended the survey made a note which was produced before me as follows:—"No. 5 strake has a rotten place in it 3½ long by 1¼ wide 3 feet 5 inches from topside of

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gunwale. No. 6 strake—2½-inch hole through—No. 7 strake 3-inch hole through."

The result of this evidence on my mind, and the Elder Brethren agree with me, is this, that lighter "No. 72" had planking which in places had decayed, although outside there was a thin hard face on it; that a little ordinary attention would have shewn that the inside of the planking had decayed. The plaintiffs' surveyor told me that he asked the repairer to keep the plank in question and that he promised to do so, but the plank was not produced, and the repairer stated to me that he did not understand that the plaintiffs' surveyor wished the plank to be kept.

In my opinion, and in this also the Elder Brethren agree, two causes brought about the sinking of the barge: First, that she was unseaworthy, and in her decaying condition unfit to stand the knocking about which the evidence shews happened in the basin on the night in question, when it is admitted that the *Cicero* came in and the barges in the basin were all disturbed, and secondly, that she ought not under such conditions to have been left unattended. It only required the thrust of a boat-hook by some lighterman against the deeply loaded quarter of "No. 72" for her decaying plank to give way and let the boat-hook pierce her, making the jagged hole in her port quarter deposed to by all the witnesses—and I believe that this is what happened.

The next question is, who is responsible for the supplying of this unseaworthy lighter for the services in question?

The lighter foreman of the defendants at the Alexandra Dock, Hull, said that he engaged the lighters for the *Galileo* from the foreman at the dock of the Hull Keel and Lighter Company, including "No. 72." "I knew 'No. 72.' I saw her before she began to load, saw her from that time up to Tuesday at 5 P.M. I did not examine her, I left that to the foreman of the Hull Keel and Lighter Company." This foreman was called; he said she was a good lighter before the accident, and the *Cicero* was the only steamer which moved about the dock that night. He did not say when or if at any time he examined her before she was employed on this service.

In my opinion, then, the Hull Keel and Lighter Company are

responsible for supplying "No. 72" in an unseaworthy condition for the service in question.

But I have further to ask myself who are the Hull Keel and Lighter Company? I have been told by the manager and secretary. He says the company owns twenty-two keels and seventeen lighters; that the company was formed by his father in 1897, but that seven or eight years ago Messrs. Thomas Wilson & Sons took over and now hold all the shares, and the directors are the directors of the Hull Keel and Lighter Company; that Thomas Wilson & Sons own about seventy keels and lighters, and that the keels and lighters in the name of the Hull Keel and Lighter Company are numbered in succession after the keels and lighters in the name of Thomas Wilson & Sons, "No. 72" being an early number in the numbers of the Hull Keel and Lighter Company; that his office as manager and secretary is part of the office of Thomas Wilson & Sons in Hull.

I have no hesitation in finding as a fact that Thomas Wilson & Sons are the Hull Keel and Lighter Company, and that though that company retain the original name the lighter "No. 72" was at the time when it sank the property of Thomas Wilson & Sons, and that the manager and the foreman were their servants.

The result is that on the facts I find that Messrs. Thomas Wilson & Sons, the defendants, are responsible for supplying an unseaworthy lighter, "No. 72," to tranship the goods in question from the *Galileo*, and it follows that in my opinion they are responsible for not having a man in charge of her in this congested basin after this valuable cargo was put into her ex *Galileo*.

But these findings of fact do not conclude the case, because it is contended on behalf of the defendants that the conditions in the bills of lading expressly state that the transhipment of the goods was at shipper's—that is the plaintiffs'—risk.

But the bills of lading also state that the transhipment is to be at ship's expense. This involves, in my opinion, the engagement by the shipowner of proper and suitable means of transhipment, and in this case the shipowner transhipped by means of a lighter. As I have already said, I find that he engaged one of his own lighters, but assuming for the sake of argument only

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that he engaged a lighter from some other owner, he ought, in my opinion, to have been careful to see that the lighter so engaged was seaworthy, and was guilty of negligence if he loaded into an unseaworthy lighter this cargo for transhipment. I mention this in case it should be thought that my judgment upon the facts as to Messrs. Thomas Wilson & Sons being the real owners of lighter "No. 72" is wrong, but if I am right as to that finding of fact, it follows a fortiori that they were guilty of negligence in providing a lighter of their own which was unseaworthy for the purpose of this transhipment.

In my opinion, the condition "at shipper's risk" does not exempt the carrier from responsibility and he is still bound to exercise due care and diligence and be free from negligence in respect to this cargo. His is the duty and expense of transhipment, and he cannot shelter himself under the words "at shipper's risk" and fold his hands and consider himself released from the duty of himself taking every reasonable precaution to protect the property of his shipper.

There will be judgment for the plaintiffs, with costs.

1913. Nov. 4, 5. *Leck, K.C.*, and *W. N. Raeburn*, for the appellants (defendants), Thomas Wilson, Sons & Co., Limited, the owners of the steamship *Galileo*. The material words in the contract of carriage contained in the bill of lading are that the transhipment of the plaintiffs' goods at Hull for a Swedish port is to be (1.) at "ship's expense" but at "shipper's risk"; that the conveyance of the goods in craft and/or lighter from the steamer is to be (2.) "at the risk of the owners of the goods"; that the carrier shall not be liable (3.) "for risk of craft, hulk, or transhipment," and that (4.) "the liability of each carrier is limited to its own line."

It is submitted that these terms in the bill of lading relieve the appellants from liability for the loss sustained by the respondents through the sinking of the lighter during transhipment at Hull, for, as between the contracting parties, after the arrival of the goods at Hull, the liability of the appellants as carriers ceased, and they thenceforth occupied the position of forwarding agents.

Further it is submitted that the finding of the learned judge that the appellants were the owners of the lighter in question is not consistent with the evidence, as the Hull Keel and Lighter Company are a distinct commercial body, and the manager and foreman of that company were not the servants of the appellants, so as to render the appellants liable for their negligence, if any,—*Salomon* v. *Salomon & Co.* (1)—and, in fact, the claim in respect of the damaged machinery was originally made by the respondents (plaintiffs), the International Harvester Company, upon the Hull Keel and Lighter Company.

[Reference was made to *Allan Brothers* v. *James Brothers* (2); *Wade* v. *Cockerline* (3); *McCawley* v. *Furness Ry. Co.* (4); *Lane* v. *Nixon* (5); *Burton* v. *English* (6), and the cases cited in Carver's Carriage of Goods by Sea, 5th ed., s. 17, on unseaworthiness, and s. 103, on the effect of such comprehensive stipulations as "at merchant's" or "owner's risk." See also *The Moorcock* (7); *The Vortigern.* (8)]

Leslie Scott, K.C., and *Adair Roche, K.C.*, for the respondents (plaintiffs), the owners of cargo lately laden on board the steamship *Galileo.* The plaintiffs' goods, consisting of valuable agricultural machinery, required care on the part of the defendants, but, pending the arrival of the steamer to carry them from Hull to Norrköping, they transferred them to an old and unseaworthy lighter, the condition of which is described in the judgment of Bargrave Deane J., and which, according to the finding of the learned judge, was the property of the defendants, who were, in fact, the Hull Keel and Lighter Company, with the result that the manager and foreman of that company were the servants of the defendants; but apart from, and not relying upon, the question of the ownership of the lighter, it is submitted that the contract in respect of the carriage of these goods, as contained in the through bill of lading, made the defendants liable for the safe delivery of the goods at the ultimate port of destination, and, therefore, as matter of law the condition "at

(1) [1897] A. C. 22.
(2) (1897) 3 Com. Cas. 10.
(3) (1904) 10 Com. Cas. 47.
(4) (1872) L. R. 8 Q. B. 57.
(5) (1866) L. R. 1 C. P. 412.
(6) (1883) 12 Q. B. D. 218.
(7) (1889) 14 P. D. 64.
(8) [1899] P. 140

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shipper's risk" did not exempt the defendants from responsibility, for, in the words of the learned judge, they were "bound to exercise due care and diligence and to be free from negligence in respect to this cargo." See *Price* v. *Union Lighterage Co.* (1), a case which, as a leading authority, has been repeatedly followed.

[Reference was made to *Steel* v. *State Line Steamship Co.* (2); *Mitchell* v. *Lancashire and Yorkshire Ry. Co.* (3); *James Nelson & Sons, Ld.* v. *Nelson Line (Liverpool), Ld.* (4); *The Okehampton* (5); *Insurance Co. of North America* v. *North German Lloyd.* (6)]

Nov. 14. The judgment of the COURT (Lord Parker of Waddington, Lord Sumner, and Warrington J.) was read by—

LORD SUMNER. This was a claim for loss of cargo shipped at New York on board the defendants' vessel *Galileo*, bound for Hull, under a bill of lading signed on their behalf. The ultimate destination of the goods was Norrköping. When the *Galileo* arrived in Hull the defendants discharged the goods overside into lighter No. 72. They intended to ship them on board one of their steamers bound up the Baltic, and so take them to Norrköping. Whether the lighter was to convey the goods to some other wharf or dock where the succeeding steamer was to load, or was simply to hold the goods afloat till that steamer was ready to load in or near the *Galileo's* discharging berth, we do not know, nor are we told whether or not it would have been practicable to have transferred the goods direct from the one ship to the other, or with a mere intermediate deposit on quay or in transit shed. Probably it does not matter—no doubt the usual course of business in the dock was followed; but it is worth noting that the bill of lading does not prescribe any one of these courses in particular, but would equally cover all, and the direct transfer from ship to ship certainly as much as any.

(1) [1903] 1 K. B. 750.
(2) (1877) 3 App. Cas. 72.
(3) (1875) L. R. 10 Q. B. 256.
(4) [1907] 1 K. B. 769; [1908] A. C. 16.
(5) [1913] P. 173.
(6) (1901) 106 Fed. Rep. 973.

Lighter No. 72 did not belong to the defendants. Bargrave Deane J. held that it did, but this finding was a misapprehension, and is not supported. It belonged to the Hull Keel and Lighter Company, Limited, and substantially all that company's share capital belonged to the defendants. Undoubtedly it was under the defendants' control. The manager of the Hull Keel and Lighter Company had a desk in the defendants' office, and, having no special letter paper of his own, wrote on theirs. The arrangement for the use of the lighter was made verbally between the defendants' foreman and the foreman of the Hull Keel and Lighter Company. No documents appear to have passed at the time.

Two or three nights after the goods went overside the lighter foundered. Why she did so is clear, though the exact circumstances are to some extent matter of surmise. Another steamer coming into the dock, which was a crowded one, this lighter and others were moved. Bargrave Deane J. found that in the course of this operation a lighterman in fending off No. 72 with a boat-hook poked it through her side. It is probable enough: we see no reason to dissent from this finding.

No one was on board of or in attendance on No. 72. She was in fact unseaworthy. She had a patch of rotten timber on her side, masked by a thin skin of sound wood. She appeared to be in good condition; but this spot was easily vulnerable. It was pierced and down she went. It is said there was negligence because the lighter was unattended, a very common thing. In any case such negligence, if negligence it was, did not cause the loss. Neither the lighterman in attendance nor the lighterman with the boat-hook could have known or guessed that the lighter must be treated gingerly and would not stand contact with other craft or with boat-hooks. Had a lighterman been in attendance, the boat-hook would have been used just the same, and he would not have objected. If she was once holed there is no evidence to shew that a man on board could have saved her. The learned judge does not find that this was negligence causing the loss, nor do we. In fact, the goods were lost because the lighter was unseaworthy. The question is, are the defendants liable for that unseaworthiness?

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The bill of lading is described as a "through bill of lading." The voyage is described in the margin as New York to Norrköping, via Hull, the word Norrköping being filled in and the rest being a printed form. The margin states that the Wilson Line (of which the *Galileo* is one) is carrying goods at through rates to and from numerous Baltic ports, among which Norrköping is not named, though it may be swept in by "&c." The freight named is in fact a through freight, and is payable at Norrköping.

The body of the bill of lading, omitting immaterial words, runs thus: "Received in apparent good order and condition from . . . . to be transported by the steamship *Galileo*, now lying in the port of New York and bound for Hull . . . . or failing shipment by said steamer in and upon a following steamer" (sundry goods) "being marked and numbered as per margin . . . . and to be delivered in like good order and condition at the port of Hull or so near thereto as she may safely get and to be thence transhipped at ship's expense and shipper's risk to the port of Norrköping (or so near thereto as vessel may safely get) . . . . and there deliver unto order or to his or their assigns he or they paying freight and charges immediately on discharge of the goods . . . . at the rate of as per margin. Freight and charges payable at current rates of exchange per bankers' sight bills on London at date of entry at Custom House of transhipment vessel. The rate of freight is adjusted upon the basis of the following exceptions and agreements," and then follow a long excepted perils clause and twenty clauses of mutual agreements.

The short question is: Did the defendants under this bill of lading warrant the seaworthiness of the barge, or, in other words, (*a*) are they carriers through from New York to Norrköping, performing the carriage either by vessels of their own or by others, by which they sub-contract for the carriage of the goods, or which they charter for themselves, or (*b*) are they carriers only to Hull, accomplishing their obligations as carriers on discharge overside at Hull, and thereafter being authorized and bound to act as agents for the shippers in making contracts by way of bill of lading and otherwise for the purpose of getting others to carry the goods on to Norrköping? The plaintiffs

contend for the former, and the defendants for the latter alternative.

The defendants say that under this contract they could, had they chosen, have employed their own lighter and have transferred the goods to their own steamer to be carried to their ultimate destination, and they admit that if they had done so they would have impliedly warranted the seaworthiness of the lighter and the second steamer, equally as of the *Galileo*, at the commencement of each stage of this continuous operation. This at once places them in a difficulty. If they can elect whether they will deliver to another party's lighter and so end the carriage or transfer to their own and so continue the carriage, it will be a question of fact whether they did the one or the other. The ownership of the lighter is not conclusive or even very significant. They could have carried in the *Galileo* or, "failing shipment by said steamer, by and upon the following steamer," chartered or otherwise. They could have carried on to the Baltic in their own steamer or in one chartered for the purpose. Equally if they elected to be the carriers of the goods during the craft stage of the transit they might have used their own lighter or have substituted a hired one. In this case a lighter was hired; but the verbal arrangements made between the foreman of the defendants and the foreman of the lighter owners are quite colourless. No doubt some entry was made in books and some sum was credited to the lighter owners; but this would in any event be due from the defendants since transhipment is at their expense. There is no finding of fact on the point. If it is in the option of the defendants to determine their carriage at the *Galileo's* rail on arrival at Hull, or to continue it on their own or their hired lighter, they have not proved and on this evidence cannot prove that they exercised this option.

It is said that the contract determines the matter and shews that the defendants' obligations as carriers end at Hull. Thereafter their obligation is that of forwarding agents. No doubt such an arrangement may be made by apt words. *Allan Brothers* v. *James Brothers* (1) is such a case, but there, firstly, the one and only

(1) 3 Com. Cas. 10.

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bill of lading voyage ended at London, and, secondly, the transit beyond London was covered by the express word "forward." There was no question of a through voyage or of a through bill of lading. The application of such a view to the present case bristles with difficulties. If the defendants contract with the lighterman as agents for the cargo owners, the lighterman holds possession of the goods for the latter; yet it is quite certain that the former do not give up their lien for the through freight, so the lighterman also holds possession for the defendants as against the cargo owners to preserve the possessory lien for freight. Unless the lighterman has such notice of the through bill of lading as evidences a term in his contract with the goods owner not to look to the latter for payment, and evidences also a contractual obligation on the defendants to pay him, the goods owner is liable for lighter hire, and must seek indemnity from the defendants, if he can, under the words "at ship's expense." How if the defendants had a set-off against the lighterman? Clearly it is not intended that the goods owner can claim possession from the lighterman till the full freight due to the defendants is paid. Could the defendants require redelivery from the lighterman? Could the lighterman force the goods owner to take back his goods in Hull in case the defendants failed to arrange for their shipment to Norrköping? If the goods are reshipped for Norrköping and a new bill of lading is given, who is the shipper under it, and against whom has the Baltic ship its lien for freight? If the goods owner is the shipper, which is the bill of lading, by indorsement of which he can transfer the property in the goods? Is he to be liable for the entire Baltic freight, and, if so, how is his advance freight, if any, under the through bill of lading, to be adjusted? If the defendants do not pay the Baltic freight under the words "at ship's expense," is the goods owner to pay and recover it from the defendants, if he can? Equally in law and in business this view of the contract seems devised to invest the simplicity of a "through bill of lading" with every complexity that existed before through bills of lading were devised.

Nor does this construction fit the words of the document. True the goods are "to be delivered . . . . at the port of Hull";

but there is also an obligation to deliver at Norrköping or so near thereto as vessel may safely get. It is quite certain that the first delivery is not intended to be to the consignee or indorsee, and the second is expressly to be "unto order or his or their assigns." True the goods on the first delivery are to be "in like good order and condition," and this is not repeated as to the second; but since, if the defendants are under the liabilities of common carriers at all, they are bound, subject to excepted perils, to deliver "in like good order and condition" at the port to which they carry, whether the words are expressed or not makes little or no difference. It is at Norrköping, and not at Hull, that the consignee is to pay freight. He could not be called on to pay at Hull nor could he get his goods at Hull without paying the price for their carriage to Norrköping. Between Hull and Norrköping the goods, so far as freight is concerned, are at the defendants' risk. If they perform their contract of carriage by bringing the goods to Hull they must still insure their Atlantic freight against loss on the Baltic voyage by loss of the goods themselves. If the bill of lading is scrutinized it will in any case be doubtful whether the defendants' obligation to carry terminates on delivery over-side ex *Galileo* at Hull. There is no provision for a lighter stage between the import and the export ship at Hull. The transhipment, to which alone "at shipper's risk" applies, is "thence," that is, from Hull to Norrköping, and the Baltic steamer is subsequently called "the transhipment vessel." Hence at least until the goods are loaded on board the "transhipment vessel" the terms of this bill of lading, other than "at shipper's risk," apply, unless indeed it is suggested, that the *Galileo* carries subject to bill of lading exceptions, but the lighter subject to no exceptions at all, not even of perils of the seas.

Upon the construction of the instrument so far we entertain no doubt that the obligations of the defendants as carriers subsisted when the goods were shipped into lighter, and therefore that, subject to the construction of the words "at shipper's risk," if they apply to goods in lighter, as we think they do not, the defendants warranted the lighter's seaworthiness.

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Does the remainder of the bill of lading assist the defendants? The excepted perils modify their obligations as to the steamer's seaworthiness and are silent as to those of the lighter; but this does not shew that they are not liable for the lighter at all. It may be that in their own port, with one fleet of lighters which they own, and another which they control, they are not afraid of their full obligations as to the seaworthiness of lighters. They expressly exempt themselves from risk of craft, which is inconsistent with their obligations of carriage ending at the *Galileo's* rail and with their obligation ultra being merely to use diligence to make a reasonable contract for the goods owner with some lighterman. There are twenty agreement clauses. Numbers 9 and 11 clearly shew that Norrköping is the place of delivery of the goods, numbers 7 and 16 that Norrköping is equally the destination and the ultimate destination, and number 16 is wholly inconsistent with the through bill of lading being accomplished, as a contract of carriage, by delivery ex *Galileo* at Hull. Number 18 shews how loosely this document is drawn, for "the shipowners or any of them" is unintelligible. There is no transhipment port but Hull and on the voyage to Hull there are no shipowners but the defendants. Clause 20 has been much relied on by the appellants, or rather its concluding words "the liability of each carrier is limited to its own line." The first part of this clause does not negative the defendants' responsibility as carriers through to Norrköping; it only assures to them the benefit, in addition to the provisions of their own bill of lading, of any extra protection that the bills of lading in use by the route beyond Hull may provide, if such bills of lading come into existence. The remaining words are certainly not enough to negative the whole tenor of the through bill of lading; whether they have any real effect is doubtful but need not be decided. They do not apply here. There was no second line intended or arranged for. The goods had not got beyond the defendants' own line. The Hull Lighter Company's fleet of lighters is not a line, and has not any bill of lading and is no part of the route beyond Hull, and this clause does not assist the appellants.

The whole question is one of construction, and it is clear that

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the defendants were answerable under their through bill of lading for the lighter's unseaworthiness. This being so, no clause in it relieves them. Without defining exactly what the words "at shipper's risk" mean, we think that they are clearly referable to other risks than that of a breach of this fundamental obligation of the shipowner. It is not suggested that any other clause could give the defendants relief, and, therefore, their appeal must be dismissed with costs.

Solicitors for appellants (defendants), Thomas Wilson, Sons & Co., Limited: *Botterell & Roche, for Hearfields & Lambert, Hull.*

Solicitors for respondents (plaintiffs), the owners of cargo lately laden on board the steamship *Galileo*: *Waltons & Co., for A. M. Jackson & Co., Hull.*

T. L. M.

[IN THE COURT OF APPEAL.]

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[1912 H. 37.]

Admiralty—Ship—Collision—Tug and Tow—Tow and Third Ship in Collision—Tug and Third Ship to blame—Division of Loss—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1.

In an action of damage, brought by the owners of a barge against the owners of a steamship, and the owners of a tug, which had the barge in tow, in respect of a collision between the steamship and the barge, the steamship and the tug were found to blame in equal degree, and the owners of the steamship having paid the owners of the barge the amount of the damage sustained by this barge, they included this amount in their claim against the owners of the tug:—

Held by the Court of Appeal (Lord Parker of Waddington, Lord Sumner, and Warrington J.), affirming the decision of the President (Sir Samuel Evans), that the case was not governed by the common law rule as to no contribution between joint tortfeasors, and, therefore, applying the principles laid down by s. 1 of the Maritime Conventions Act, 1911, the owners of the steamship were entitled, as against the owners of the tug, to half the amount of the damage sustained by the steamship, including therein half the amount of the damage sustained by the barge.

APPEAL by defendants, owners of the steam tug *Nunthorpe*, against a decision of the President (Sir Samuel Evans) in favour of the respondents (defendants and counter-claimants), the

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owners of the steamship *Cairnbahn*, in an action of damage by collision, in which the plaintiffs were the owners of the hopper barge *Newport No.* 5.

The case is reported on the question of the construction to be placed on s. 1 of the Maritime Conventions Act, 1911 (1), as affecting the liability, between themselves, of two vessels both to blame for a collision between one of those vessels and a third vessel not to blame.

The circumstances giving rise to the application of s. 1 of the above Act were shortly as follows :—

On December 21, 1911, the paddle steam tug *Nunthorpe*, belonging to the port of Middlesbrough, was in the river Tees, near Redcar Wharf, bound to the ballast grounds outside Tees Bay, with two loaded hoppers in tow, the *Newport No.* 5 on the tow rope, and the *Newport No.* 2 astern of her. The tug had control of the navigation, and was proceeding down the river to the south of mid-channel, sounding her whistle for fog, when those in charge heard a prolonged blast from a whistle which proved to come from the *Cairnbahn*, a screw steamship, belonging to the port of Newcastle-on-Tyne, which was proceeding up the river, in a charge of a pilot, in the course of a voyage from Huelva to Stockton with one passenger and a cargo of mineral ore. After an exchange of whistle signals the *Cairnbahn* came in sight,

(1) 1 & 2 Geo. 5, c. 57 :

"1.—(1.) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: Provided that—

"(*a*) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

"(*b*) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and

"(*c*) nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law or as affecting the right of any person to limit his liability in the manner provided by law.

" . . . . ."

bearing about four points on the port bow of the tug. The tow rope was slipped and the tug cleared the *Cairnbahn*, but, though the helm of the hopper No. 5 was put hard-a-port and the helm and engines of the steamship were used in an attempt to avoid collision, the *Cairnbahn* with her stem struck the port side of the hopper, doing and receiving damage.

The action was tried on May 6 and 7, 1912, by the President (Sir Samuel Evans), assisted by two of the Elder Brethren of the Trinity House, and the President found that the steamship *Cairnbahn* and the tug *Nunthorpe* were in fault in equal degree for the collision between the steamship and the hopper No. 5, whilst the hopper was free from blame. The question was reserved whether on these findings the admiralty rule as to division of loss applied between the two vessels in fault, as contended on behalf of the owners of the steamship *Cairnbahn*, so that the owners of the tug would have to bear half the loss sustained by the owners of the steamship, including half the amount of the damage sustained by the owners of the hopper, and paid by the owners of the steamship, or whether, as contended on behalf of the owners of the tug *Nunthorpe*, the common law rule of no contribution between joint tortfeasors applied.

As between the tug *Nunthorpe* and her tows, the hopper barges Nos. 2 and 5, it was alleged by the owners of the tug that they were under no liability for any damage occasioned to the plaintiffs by the collision, as the hoppers No. 2 and No. 5 were being towed by the *Nunthorpe* on the terms that her owners "were not to be answerable for any damage vessels may do or receive whilst being towed"; but as between the tug and the damaged hopper in tow, the President held that the terms of the contract of towage did not exonerate the tug owners from liability for the negligence of their own servants.

On November 7, 1912, the President delivered the following considered judgment on the question whether the admiralty or the common law rule was to be applied as between the *Nunthorpe* and the *Cairnbahn*:—

Sir Samuel Evans. In this case the proceedings were brought after the passing of the Maritime Conventions Act, 1911, and

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the case is therefore to be determined in accordance with the provisions of that statute.

The collision took place between an innocent barge in tow of the tug *Nunthorpe* and a steamship, the *Cairnbahn*, by which both the barge and the steamship were damaged.

The collision was due to the fault of the tug and of the steamship. The tug and steamship were held to be in fault in equal degree, and accordingly the liability, if any, for the damage or loss was adjudged to be borne equally between their owners. The owners of the steamship *Cairnbahn* claim that the owners of the tug *Nunthorpe* should bear half the loss sustained by the steamship by reason of the collision. The innocent barge recovered the whole of her damage against the steamship. It was admitted in terms by counsel for the owners of the tug *Nunthorpe* that if the owners of the steamship were entitled to claim any damage from them, they, the owners of the steamship, were entitled to include in their damage or loss the amount of the judgment obtained against them by the innocent tow, but it was contended that, as both the steamship and the tug were in fault, the owners of the steamship were not entitled to call upon the owners of the tug to bear any share of the loss, because the two vessels were in the position of joint tortfeasors. It was argued that as the two vessels in fault were not "colliding vessels," the admiralty rule, preserved by sub-s. 9 of s. 25 of the Judicature Act, 1873, would not have applied before the Maritime Conventions Act, 1911, came into operation; that the Act did not alter the law in this respect; and that the common law principle, that there can be no contribution between joint tortfeasors, governed the case.

It is necessary for the decision of the case to determine the construction to be placed upon s. 1 of the Act of 1911. The Act was passed to amend the law in relation to merchant shipping, to enable effect to be given to certain international conventions, which are referred to in the preamble. Sub-s. 9 of s. 25 of the Judicature Act, 1873, already referred to, was expressly repealed by the Act (s. 9, sub-s. 3). It is therefore wholly unnecessary to decide what the rights of the parties would have been if that repealed enactment were still in force. The wording of s. 1, sub-s. 1,

of the Act of 1911 is quite different from that of the repealed sub-section. What is the proper construction of the section? Its language appears to me to be quite plain. Reading the words of the section which are applicable to the circumstances of this case, it enacts that, where by the fault of two vessels damage or loss is caused to one or to both of those vessels, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault (subject, of course, to the proviso). There is nothing in the section about the two vessels in fault being themselves in collision with each other. Translate the words into the facts of this case, then the enactment would read thus: "Where by the fault of the tug *Nunthorpe* and the steamship *Cairnbahn* damage or loss was caused to the *Cairnbahn*, the liability to make good such damage or loss shall be in proportion to the degree in which he tug *Nunthorpe* and the steamship *Cairnbahn* were in fault, namely, in equal degree." As has been said, the damage or loss caused to the *Cairnbahn* was admitted to include the sum which the *Cairnbahn* was adjudged to pay to the innocent barge, as well as the damage caused to the steamship herself. Counsel for the tug, however, contended that proviso (*c*) in s. 1 exempted the tug from liability by some "provision of law," that if the vessels in fault did not themselves collide there is to be no contribution between them. This is rather like contending that, although s. 1 makes an alteration in the law, the proviso says there is to be no alteration. In my opinion, that is not the meaning or effect of the proviso. It is not necessary to enumerate what may be included in the words "provision of law," but an instance of such provision is, I think, to be found in the statutory enactment providing for the defence of compulsory pilotage (Merchant Shipping Act, 1894, s. 633). If the words in the section which I have to construe were ambiguous, I think I should be entitled to look at the conventions referred to in the preamble, in order to see whether a reasonable construction could be given to the section which would carry out what was agreed by the high contracting parties to the conventions. It is not necessary to do this, because the words appear to be unambiguous and clear; but it is satisfactory to find on

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reference to the terms of the conventions that the section in its plain meaning does carry out what was agreed.

I therefore decide that the owners of the tug *Nunthorpe* must bear half the loss sustained by the steamship *Cairnbahn*, including a moiety of the amount of the damage that her owners paid to the barge owners, and I give judgment accordingly, with costs, and order the usual reference to ascertain the amount of the damage or loss. (1)

1913. Oct. 31; Nov. 3. *Leslie Scott, K.C.*, and *D. Stephens*, for the appellants, the owners of the steam tug *Nunthorpe*.

Aspinall, K.C., and *Dawson Miller, K.C.*, for the respondents, the owners of the steamship *Cairnbahn*.

The arguments of counsel sufficiently appear from the judgments.

Cur. adv. vult.

Nov. 13. LORD PARKER OF WADDINGTON. By the fault of the *Cairnbahn*, and the *Nunthorpe*, damage has been caused to the *Cairnbahn*. The case, therefore, falls within the express words of s. 1 of the Maritime Conventions Act, 1911. It is suggested, however, that the prima facie meaning of these words is controlled by the preamble of the Act and the title of the fasciculus of clauses in which s. 1 appears. I am unable to adopt this suggestion. I do not think that such preamble or title can, according to any sound canon of construction, be called in aid to control the meaning of words in themselves clear and unambiguous. If, however, the preamble and title could have been so called in aid, I think the Court would have also had to look at the conventions referred to in the preamble.

The section, then, being applicable to the present case, we have to consider its true meaning and effect. It provides for the apportionment in a certain way of the "liability for the damage or loss" referred to, that is to say, the damage or loss

(1) As to a moiety of the costs, paid by the owners of the *Cairnbahn* to the owners of the hopper barge *Newport No. 5*, not being included in the claim by the owners of the *Cairnbahn* against the owners of the tug *Nunthorpe*, see *The Cairnbahn* [1913] W. N. 165

caused by the fault of two or more vessels to one or more of those vessels, to their cargoes or freight, or to any property on board.

Before the passing of the Act there was at common law no liability on the part of any one to make good the damage caused to the *Cairnbahn*, both she and the *Nunthorpe* being to blame, and, according to the admiralty rule referred to in s. 25, sub-s. 9, of the Judicature Act, 1873 (if such rule were applicable), the only liability to make good this damage lay on the *Nunthorpe*, but to the extent only of a moiety thereof. Having regard to the strange results which would otherwise follow, I think that the section must be construed not as apportioning any existing liability, but as providing that the whole of the damage or loss referred to is to be borne in proportion to the degree in which each vessel is in fault, and if it be impossible to establish different degrees of fault, then equally.

I do not think that there is anything in proviso (*c*) to preclude the adoption of this construction. The fact that the *Nunthorpe* was not by common law under any liability, or, if the admiralty rule would have applied, was liable for a moiety of the damage only, could not, in my opinion, entitle her to say that she was, within the meaning of the proviso, wholly or partially exempted from liability by some provision of law. Further, I think that though the section refers to damage or loss caused to one or more of the vessels in fault, to their cargoes or freight, or to any property on board, this is only a figurative way of referring to the damage or loss caused to the persons interested in the vessels, their cargoes or freight, or any property on board. Loss cannot, with any propriety of language, be said to be caused to a vessel or other property, though it may well be said to be caused to those interested in the vessel or property in question.

This being so, the only remaining question is whether the sum recovered by way of damages against the owners of the *Cairnbahn*, by the owners of the hopper barge, damaged through the fault of the *Cairnbahn* and the *Nunthorpe*, is loss caused to the owners of the *Cairnbahn* within the meaning of the section. In my opinion it is.

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Lord Parker of Waddington.

It should be remembered that the Act repeals sub-s. 9 of s. 25 of the Judicature Act, 1873, altogether, and unless the ambit of the 1st section of the Act includes all cases within the rule referred to in the repealed sub-section, there might, and probably would, arise the very confusion and difficulty which the repealed sub-section was designed to prevent. According to *The Frankland* (1) this admiralty rule was applicable to the loss in question. It is said that this case was wrongly decided, because no case can be found in which the rule was so applied prior to the Judicature Act, 1873. Even if this be so, the decision seems to be in accordance with the spirit and within the reason of the rule, and the provisions of the section not being, in my opinion, confined to collision cases—in other words, being wider in their application than the admiralty rule—there would appear to be no reason for imputing to the Legislature an intention to perpetuate an illogical exception from that rule, if that exception ever existed. The words of s. 1 are wide enough to cover the sum recovered against the *Cairnbahn*, and I think that that sum must be apportioned in accordance with the section.

I need only add that the alleged contract, between the owners of the *Nunthorpe* and the owners of the hopper barge, to the effect that the former should not be liable for damage done to the hopper barge while under tow, not being in my opinion proved, it is unnecessary to deal with the argument based on such contract. The decision of the President therefore stands.

LORD SUMNER. The owners of the *Cairnbahn* suffered "damage" because their ship ran into the hopper which was in tow of the tug *Nunthorpe*. They suffered "loss" because the owners of the hopper sued them for her injuries and won. They suffered both by the "fault" of the two vessels, the *Cairnbahn* and the *Nunthorpe*, or rather by the faulty navigation of those in command of them.

Why does not s. 1, sub-s. 1, of the Maritime Conventions Act 1911, apply to this case? Though damage may be caused to a vessel, loss cannot be, nor is the phrase "damage is caused to a vessel" apt to express simply that the vessel is damaged. Loss

(1) [1901] P. 161.

is caused to the owners and charterers of the vessel, and damage is caused to them too when the vessel is damaged. I think the section regulates rights and liabilities between parties in fault and extends to pecuniary prejudice, which may accrue, legally and not too remotely, to persons interested in vessels by reason of the faulty navigation of persons for whom they are responsible. The word "loss" is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer. It covers the sum recovered by the owners of the hopper against the owners of the *Cairnbahn*. To say that damage to the hopper is not loss to the *Cairnbahn* so as to be loss or damage caused to one or more of "those vessels," namely, those vessels which are in fault, is to make this remedial legislation unexpectedly onesided. Is the jurisdiction to apportion the consequences between the vessels in fault to stop short at the consequences to the vessel and not to extend to the consequences to the owner? I cannot doubt that where the jurisdiction to apportion such consequences applies it is meant to apply widely.

Then it is said that the section does not apply to the amount recovered by the hopper against the *Cairnbahn* because it provides for "the" liability to make good the damage or loss, meaning thereby only the liability theretofore existing. I do not accept the contention that s. 25, sub-s. 9, of the Judicature Act, 1873, had the effect of limiting the half-and-half rule to cases where two ships come into collision and only injure one another, nor do I think that *The Frankland* (1) and other cases, which applied that rule to other damages, can be questioned, but the short answer to this argument is that s. 9, sub-s. 3, of the Maritime Conventions Act, 1911, repeals this sub-section of the Judicature Act. To provide for a modification of the liability declared by s. 25, sub-s. 9, of the Judicature Act in the 1st section, and in the last but one to repeal that liability and the sub-section which declares it, would be strange legislation. If "the liability" meant "the liability" declared by the Judicature Act, the sub-section would have been preserved, not repealed. In

(1) [1901] P. 161.

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fact, the language of s. 1 is new. In my opinion "the liability to make good" means that the defendant in fault shall be liable, when liable at all, for the faulty navigation which causes loss or damage to vessels, their cargoes or freight, or to the property on board, in proportion to the degree in which his servants in charge of his vessel participated in the faulty navigation.

Then it is said that proviso (*c*) to s. 1 prevents the section from being construed as imposing a liability on the *Nunthorpe*, because she is exempted by a provision of law; that proviso (*c*) prevents the tug from being liable at all because she enjoys an exemption from liability under the rule in *Merryweather* v. *Nixan*. (1) I think this is a misuse of terms. That rule does not exempt tortfeasors from liability when they happen to be joint tortfeasors. They are liable, but liable to the tort-sufferers. What it does is to impose a disability on the joint tortfeasors, preventing them from suing one another. It decides that no assumpsit to contribute can be implied between such persons. The rule is not a provision of law conferring an exemption. Further, historically, the half-and-half rule was being applied in the Court of Admiralty to cases of collision where both ships were to blame some years before *Merryweather* v. *Nixan* (1) was decided, and no reason can be shewn why the Legislature should have sought to apply the latter rule in 1911 at the expense of the former.

I think that the judgment below was right, and that the appeal must be dismissed.

WARRINGTON J. The dramatis personæ in this case are:—

1. The *Cairnbahn*, a steamer.

2. The *Nunthorpe*, a tug.

3. Some hopper barges, which, at the time of the accident hereafter mentioned, were in tow of the tug.

I use the expression "dramatis personæ" advisedly, because the Maritime Conventions Act personifies the vessel, treating it at one time as the actor, at another as suffering damage or loss, and at another as liable to make good such damage or loss. The truth is, of course, that for the purpose of ascertaining

(1) (1799) 8 T. R. 186.

the legal effect, the word in one context connotes those responsible for the navigation of the vessel; in another those who are interested in her, her cargo or freight; and in another those who are in law answerable for the conduct of those in charge.

On December 21, 1911, the *Cairnbahn* came into collision with one of the hoppers, doing damage thereto and sustaining damage to herself. The *Nunthorpe* was not in collision either with the *Cairnbahn* or with the hopper. Two actions were brought: (1.) by the owners of the hopper against the owners of the *Cairnbahn*, to which the owners of the *Nunthorpe* were afterwards added as defendants; (2.) by the owners of the *Cairnbahn* against the owners of the *Nunthorpe*. These actions were consolidated, and at the trial it was held that the *Cairnbahn* and the *Nunthorpe* were equally to blame, but the hopper was blameless. The hopper recovered from the *Cairnbahn* alone the whole of her claim for damages, and this judgment has been satisfied. The learned President has ordered the owners of the *Nunthorpe* to pay to the owners of the *Cairnbahn* (1.) one half of the damage to that ship occasioned by the collision; (2.) one half of the damages paid by her to the owners of the hopper. The owners of the *Nunthorpe* appeal against this order, insisting that they are under no liability to the owners of the *Cairnbahn* under either of the two heads mentioned above.

The question turns on the construction of the Maritime Conventions Act, 1911. The appellants contend that the 1st section of this Act regulates only the mode of apportioning a liability existing independently of the Act, and that they were under no such liability in the present case. The respondents say that it enforces contribution in all cases in which damage or loss has been caused to one or more of the vessels in fault, whether the other of such vessels would, or would not, but for the Act, have been liable to contribute to such loss.

If the true construction of the Act is that contended for by the respondents it is not necessary to consider whether the order of the learned President would have been justified under the rules previously governing the Admiralty Division, but it may be desirable by way of explanation to state what I understand to be

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the contention of the appellants on this point. They refer to the Judicature Act, 1873, s. 25, sub-s. 9, which is in the following terms: "In any cause or proceeding for damages arising out of a collision between *two* ships, if *both ships* shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail," and they say it is only in the case mentioned there—namely, of a collision between two ships, both of which two ships are to blame—that any liability to contribution arises; that they are under no such liability, inasmuch as the hopper which alone was in collision with the *Cairnbahn* was not one of the two ships which were to blame, and they are accordingly entitled to rely, as an answer to the claim by the *Cairnbahn* for damage to herself, on the defence of contributory negligence; and as an answer to the claim for contribution to the damage to the hopper on the plea that there is no contribution between tortfeasors. They further insist that the Maritime Conventions Act has made no alteration in the law in this respect.

I now proceed to consider the construction of the Act. The 1st section is in these terms: "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault," and then, after two sub-sections which have no bearing on the question, there is a proviso (*c*), "Nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law." Then sub-s. 2 is in these terms: "For the purposes of this Act, the expression 'freight' includes passage money and hire, and references to damage or loss caused by the fault of a vessel shall be construed as including references to any salvage or other expenses, consequent upon that fault, recoverable at law by way of damages." Then s. 9, sub-s. 3, provides that "Sub-section (9.)

of section 25 of the Supreme Court of Judicature Act, 1873, shall cease to have effect."

The question arises directly on the first sentence of s. 1, and the other parts of the Act are only material so far as they throw light on the construction of that sentence. Now, the first thing to be noticed is that the damage or loss there referred to is such as is caused by the fault of two or more vessels. It is not confined to damage or loss arising out of collision between two vessels, both of which are found to be in fault, but would include in terms the damage to the *Cairnbahn* caused by collision with the hopper. The damage to the hopper is, of course, not damage to one of the vessels by whose fault it is caused. Whether the payment of compensation by the *Cairnbahn* may properly be treated as loss caused to her by the fault of the *Nunthorpe* and herself I will consider later. The damage to the *Cairnbahn* is therefore a damage within the opening words of the section. But what is it that is to be in proportion to the degree of fault? It is described as the "liability to make good the damage or loss." This cannot, in my opinion, mean simply the liability in a Court of law to be ordered to make it good, for that which is to be made good includes the damage or loss which has to be borne by the injured vessel herself, and she cannot properly be said to make good her own damage or loss. It seems to me that the expression must be read as equivalent to "the burden of the damage or loss," or some such expression. If the words are thus read, the argument that they refer to some previously existing legal liability, and only deal with the mode of *apportionment* of that liability, fails. That which is to be apportioned for the future is the entire damage or loss caused to one or more of the vessels by whose fault it is caused, and each of such vessels is to make good a proportion of that loss. That seems to me to be the meaning of the words, and I can find nothing in any other part of the Act inconsistent with them as so construed; on the contrary, the provision contained in s. 9, sub-s. 3, that s. 25, sub-s. 9, of the Judicature Act, 1873, shall cease to have effect, supports it, because otherwise the admiralty rule as to the apportionment between the guilty ships of the damage arising from collision between them would no longer have force in all

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Divisions, and the confusion, the removal of which was the object of the repealed section, would be reintroduced. Moreover, that it was intended by the Act to enlarge the scope of the liability to contribute, and not merely to deal with the proportion of contribution, is shewn by the fact that it extends to cases when more than two vessels are involved, the Judicature Act being confined to cases in which two colliding vessels only are in fault.

I am, therefore, of opinion that, according to the true construction of the Act, all damage or loss to one or more of the vessels in fault is to be apportioned between those vessels, whether it arises from collision between them or not. The enacting words seem to me free from ambiguity, and it would therefore, in my opinion, be improper to seek to control them by reference to the preamble or the headings of the divisions of the Act.

The *Nunthorpe* fails to bring herself within the protection afforded by sub-s. (*c*). She has failed to establish any contract of exemption, nor is there any provision of law by reason of which she can properly be said to be exempt. The two principles of law on which she relies, as mentioned above, do not, in my opinion, provide exemptions from some general liability, but prevent any liability from arising at all in the cases to which they apply. The President was, in my opinion, right in holding the *Nunthorpe* liable for her due proportion of the damage to the *Cairnbahn* herself.

There remains the question as to the damages paid to the owners of the hopper by the owners of the *Cairnbahn*. I fail to see why the sum so paid should not be properly held to come within the expression "loss caused to that vessel"—treating the word "vessel" in this part of the Act as used figuratively for the owners of the vessel. They seem to me to come exactly within the definition of loss in sub-s. 2 as expenses recoverable at law by way of damages. In the present case they were, in fact, so recovered. Even prior to the Act such an expense was included by Sir Francis Jeune in the sum to be apportioned in the case of *The Frankland* (1), and I am not prepared to say that

(1) [1901] P. 161.

his decision was wrong. Even if it were so, under the law as it then stood, that fact would not affect the construction of the new Act. In my opinion, therefore, the order of the President was right in this respect also, and the appeal fails.

In the view I take of the construction of the Act it is unnecessary to consider the cases cited as to the rules of the Admiralty Division prior to the Act, but, as at present advised, I think the enforcing of contribution was not confined within the narrow limits contended for by the appellants.

Something was said as to the possible effect of the Act, if construed as I think it should be, upon the right of the innocent party to recover the whole of his loss from one of the wrong-doers: see *The Devonshire.*(1) In this connection I will only say that the Act appears to me to deal with the question from the point of view of the guilty parties only. The rights of the innocent party, however, are not in issue in this case, and I should have said nothing on the subject but for the doubt suggested in argument, a doubt which I do not desire to encourage.

Appeal dismissed.

Solicitors for appellants, the owners of the *Nunthorpe: Stokes & Stokes, for Jas. Storey & Sons, Sunderland.*

Solicitors for respondents, the owners of the *Cairnbahn: Botterell & Roche.*

(1) [1912] A. C. 634.

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[DIVISIONAL COURT.]

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[PLAINT R. 7044.]

Admiralty—Collision—Steam Vessel coming out of Dock in the Mersey—Steam Vessel moving in the River—The Crossing Rule (art. 19) of the Regulations for Preventing Collisions at Sea—Rules of Good Seamanship.

Although the crossing rule (art. 19) of the regulations for preventing collisions at sea applies in the Mersey when there is risk of collision between a steam vessel coming out of dock and a steam vessel moving in the river, there will, from the necessity of the case, be a time before the application of the rule becomes possible, and, during that time, those in charge of each vessel must be guided in their navigation by the rules of good seamanship.

The Sunlight [1904] P. 100, considered.

APPEAL by defendants and counter-claimants, owners of the steamship *Llanelly*, against a decision of the judge of the Liverpool County Court pronouncing their vessel alone to blame for a collision with the steamship *Deloraine*, owned by the plaintiffs (respondents).

The case is reported on the question of the application of art. 19 of the regulations for preventing collisions at sea to the case of a steam vessel coming out of dock in the Mersey and crossing another steam vessel moving in the river. (1)

On February 13, 1913, about 5.45 P.M., a collision occurred in fine weather in the river Mersey between the *Deloraine*, a screw steamship belonging to the port of Glasgow, of 265 tons gross register, engines of 37 horse power nominal, manned by a crew of seven hands, proceeding up the river, in light trim, from Wexford to Liverpool, and the *Llanelly*, a screw steamship of the port of Liverpool, of 369 tons gross register, engines of 86 horse power nominal, and manned by a crew of ten hands. She had just left the thirty-feet lock of the Alfred Dock, Birken-

(1) Art. 19: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

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head, bound for the port of Llanelly with a part cargo of general merchandise. Both vessels were exhibiting the regulation lights for a steamship under way.

The material facts sufficiently appear from the following judgment, delivered October 30, 1913, by the learned judge of the Liverpool County Court, who was assisted by two nautical assessors:—

"The Court finds that when the *Deloraine* was proceeding up the river at a speed of three or four knots over the ground, the tide being ebb, running three or four knots, and having arrived at a position halfway between Seacombe Stage and the Alfred Dock entrance, having passed the stage at a distance of about 500 feet, she observed the *Llanelly* with her port light shewing, coming out of one of the Alfred Dock locks. Other vessels, the *Helge* and *Sphene*, were coming up the river to the east of the *Deloraine*, slightly astern of her. Upon seeing the *Llanelly* the *Helge* blew two short blasts and immediately this was followed by two short blasts from the *Deloraine*, who in accordance therewith starboarded her helm. The *Llanelly* answered with one short blast, indicating that she was directing her course to starboard. These signals were replied to by the *Helge* and *Deloraine*, and were followed, when the *Llanelly* continued to approach the *Deloraine*, by three short blasts from the *Deloraine*, indicating that her engines were going astern. The collision occurred almost immediately, the *Deloraine's* stem coming in contact with the port quarter of the *Llanelly*. The two vessels were then about 1000 feet out from the Alfred Dock entrance but abreast of the north side of the entrance. The Court is of opinion that art. 19 of the regulations for preventing collisions at sea does not apply. The master of the *Llanelly*, when he observed, as he was able to do and did do, the *Deloraine* and the other two vessels proceeding up the river off Seacombe Stage, was negligent in proceeding into the river and attempting to cross the bows of the *Deloraine*. There was nothing to prevent him from remaining in the bell mouth until the *Deloraine* had passed. The Court finds that the *Deloraine* was navigated in a seamanlike manner. The Court finds the *Llanelly* alone to blame."

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1913. Dec. 2. *Bateson, K.C.*, and *Noad*, for the appellants (defendants and counter-claimants), the owners of the steamship *Llanelly*. The learned county court judge was wrong in holding that the *Llanelly* was alone to blame. The regulations for preventing collisions at sea apply to vessels navigating the river Mersey (see rule 1 of the Mersey Rules), and the vessels were, at the material time, crossing so as to involve risk of collision within the meaning of the crossing rule (art. 19), which is not affected by any of the exceptions and additions inserted in those regulations by the local authority. It was, therefore, the duty of the *Deloraine*, having the *Llanelly* on her own starboard side, to keep out of the way and allow the *Llanelly* to cross ahead so as to get on to the other side of the river in the course of her voyage to Llanelly; but the *Deloraine* failed to ease in time and by starboarding caused the collision. She is, therefore, solely to blame.

Laing, K.C., and *A. Hyslop Maxwell*, for the respondents (plaintiffs), the owners of the steamship *Deloraine*. The decision in the Court below was right, for art. 19 of the regulations for preventing collisions at sea does not apply in the Mersey to the case of a steam vessel coming out of dock: see *The Sunlight* (1); and the reference thereto in Marsden's Collisions at Sea, 6th ed., p. 404. From the necessity of the case, the rules of good seamanship must govern the situation. The *Deloraine* could not know in which direction the *Llanelly* would proceed, and it would only be after that vessel had got on to her course down the river, and there was risk of collision, that the crossing rule could become applicable—that is to say, assuming that art. 19 would apply, the special circumstances of the case involved the application of arts. 27 and 29, by which a departure from the rules is provided for, and those in charge of the *Llanelly* would be required to take the necessary precautions to avoid immediate danger in accordance with the ordinary practice of seamen.

Bateson, K.C., in reply. The case of *The Sunlight* (1) was mentioned in the Court below, but was not referred to by the learned county court judge in his judgment. It is submitted

(1) [1904] P. 100.

that so far as it was held in that case that art. 19 of the regulations for preventing collisions at sea did not apply in the Mersey, or did not apply to the case of a vessel coming out of dock in the Mersey, it was wrongly decided.

THE PRESIDENT (SIR SAMUEL EVANS). This case was very carefully tried by the learned county court judge, and he gave an admirably clear judgment—and it is none the less clear because it is brief.

I see no reason at all to differ from the findings of fact arrived at by the learned judge in the Court below. He had all the witnesses before him, and this Court, although it has the power to arrive at different conclusions of fact upon the evidence, is very slow to do so. In this case I see no reason at all to differ from the learned judge in the conclusions at which he has arrived.

The question is whether the learned judge has properly applied the law. I am not going to detail the facts. They are fairly simple. He has found the *Llanelly* to blame for negligence in proceeding into the river and attempting to cross the bows of the *Deloraine* when there was nothing to prevent those in charge of the former vessel "from remaining in the bell mouth until the *Deloraine* had passed." With those findings I entirely agree, and therefore the learned judge, in my opinion, was perfectly right in holding that blame was attachable to the *Llanelly*.

In order to consider the conduct of the other vessel I will just state quite briefly what risks the *Llanelly* was causing. She was coming out from dock, and, according to her own evidence and upon the undisputed facts, she had seen lower down the river three vessels, one being the *Deloraine*, the nearest of the three. In coming out of dock a vessel ought to navigate with the greatest possible caution. So far from being cautious, this vessel proceeded, at such speed as she could attain in the circumstances, to cross ahead not only of the *Deloraine* but of the *Helge* and of the *Sphene*, the vessels further away. In these circumstances these three vessels had to do something, they were driven to do something, and did do something, and the question is, so far as the *Deloraine* is concerned, whether she did that which was

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right. The first thing done on these three vessels—the starboard helm signal having been given—was to starboard the helm. I do not think—and the two Elder Brethren who are assisting us agree in this—that at that stage the order to starboard given by the *Deloraine* was a wrong order. I think her master might very well have said to himself that the *Llanelly* must be going to do something to avoid the risks caused by conduct so faulty, and that he would give her more room by starboarding; and it is to be observed that the same thing was done by the other two vessels. At this stage the *Helge* and the *Sphene* fall out of the story.

Now comes the further question, whether the *Deloraine* was in fault for anything which she did or for anything which she omitted to do afterwards. The finding of the learned judge is clear that the two-blast signal was repeated from the *Deloraine* after the port helm signal of the *Llanelly* was given. That is contrary to the evidence of the master, but it is in accordance with the evidence of the pilot from the *Helge*, and therefore the learned county court judge was amply justified in finding that the repetition of the two-blast signal was after the port helm signal was heard from the *Llanelly*. That means that the *Deloraine* determined upon a course which might bring her into collision. Certainly, before determining to continue on her starboard helm, she ought in my opinion to have reversed her engines. That she reversed her engines late follows from the findings as stated in the judgment: "These signals were replied to by the *Helge* and *Deloraine*, and were followed, when the *Llanelly* continued to approach the *Deloraine*,"—translated, that means they were getting into pretty close quarters—"by three short blasts from the *Deloraine*, indicating that her engines were going astern. The collision occurred almost immediately."

I have come to the conclusion, therefore, that there was some blame to be attached to the *Deloraine* for continuing to starboard and for not easing her engines as the other vessels did, and not reversing earlier than she did.

I want to say one word with regard to the argument that art. 19 of the regulations for preventing collisions at sea does

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not apply in the Mersey. I want it to be clearly understood that the rule does apply in the Mersey in all fit and proper cases. There comes a time in the manœuvres of a vessel coming out of dock when that rule would attach. There is a time, also, in my opinion, up to which, in the course of such manœuvres, it is impossible to apply the rule. Some instances have been given in argument to-day by counsel for the respondents; but it is sufficient for me to say, for the purposes of this case, without the slightest desire to weaken or undermine the force, authority, and efficiency of the rule in the Mersey, it is not art. 19 we have to apply in this case, but the rules of good seamanship.

Our decision is that in part this appeal succeeds. We find that the main portion of the blame lies with the *Llanelly*, the vessel coming out of dock; but blame in some degree also rests upon the other vessel—not in an equal degree because she was put in the position in which she was by the initial bad seamanship of the *Llanelly*. We hold the *Llanelly* three-fourths to blame, and the *Deloraine* one-fourth.

Bargrave Deane J. I am entirely of the same opinion. I am particularly anxious not to displace the judgment of Bucknill J. in *The Sunlight* (1), but at the same time not to allow it to be thought of universal application, that art. 19 is never to apply to vessels coming out of dock. As my Lord has said, perhaps initially when a vessel is seen coming out of dock, and if the vessels are very close, the rule cannot be made to apply; but it is to be taken to apply unless the circumstances displace its application.

Appeal allowed without costs here or below.

Solicitors for appellants (defendants), the owners of the steamship *Llanelly: Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for respondents (plaintiffs), the owners of the steamship *Deloraine: Hill, Dickinson & Co., Liverpool.*

(1) [1904] P. 100.

T. L. M.

C. A.
1913
Nov. 5.

[IN THE COURT OF APPEAL.]

THE OPHELIA.

[1913 A. 194.]

Admiralty—Practice—Collision—Defence of Compulsory Pilotage with Denial of Negligence—Costs.

In an action of damage by collision the defendants pleaded inevitable accident, and, alternatively, that if (which was denied) the collision and damage were caused or contributed to by any negligence on the part of any one on board their steamship, such negligence was solely that of a duly licensed pilot who was in charge of their vessel within a district in which the employment of the pilot was compulsory by law. Bargrave Deane J. found that the collision was occasioned by the fault of the pilot alone and dismissed the plaintiffs' action; but made no order as to costs. The defendants, by leave, appealed on the ground that the learned judge, in the exercise of the judicial discretion vested in him under the Judicature Act, should, according to the alleged existing admiralty practice, have given the defendants the costs of defending the action:—

The Court of Appeal (Lord Parker of Waddington, Lord Sumner, and Warrington J.) declined to lay down any general rule for the guidance of Courts of first instance beyond what had already been done by the Court of Appeal, namely, that, if there be but one issue in the action, the successful party is, prima facie, entitled to costs, as where the defence of compulsory pilotage is the only issue raised; but where, as in the present case, the defendants undertake to prove that there was no faulty navigation on the part of anybody, and fail, though succeeding upon the issue of compulsory pilotage, the Court below will be rightly exercising its discretion, apart from special circumstances, in making no order as to costs.

Appeal by leave, on the question of costs only, from a decision of Bargrave Deane J. in an action of damage by collision.

The appellants (defendants) were the owners of the steamship *Ophelia*.

The respondents (plaintiffs) were the owners of the steamship *Aunis*.

The case is reported on the question of the practice followed in admiralty cases in respect of costs where more than one issue is raised by the defence.

On January 30, 1913, about 11 A.M., in foggy weather, the *Aunis*—a twin screw steamship belonging to the port of Rouen,

of 439 tons gross register, engines of 61 horse power nominal, and manned by a crew of twelve hands, on a voyage from London to Rouen with a general cargo—was lying at anchor inside the anchorage ground in Gravesend Reach of the river Thames, ringing her bell, and heading to the ebb tide of about two knots, when she was run into by the *Ophelia*, a screw steamship belonging to the port of Hamburg, of 1153 tons gross register, engines of 110 horse power nominal, and manned by a crew of seventeen hands, on a voyage from London to Hamburg with a general cargo and sixteen passengers.

By their statement of claim the plaintiffs, inter alia, charged the defendants with not keeping a good look-out, with proceeding at an excessive speed in fog, and failing to stop and then navigate with caution on hearing a fog signal forward of the beam, the position of which was not ascertained, contrary to art. 37 of the Thames by-laws; and not stopping and reversing on approaching the *Aunis*, contrary to art. 49 of the same by-laws.

By their defence the defendants raised two issues, namely, (1.) that the "collision could not have been avoided by the exercise of ordinary and reasonable maritime care and skill on the part of those in charge of the *Ophelia* and was so far as the defendants are concerned an inevitable accident." (2.) "Alternatively, if (which is denied) the said collision and damage were caused or contributed to by any negligence on the part of any one on board the *Ophelia* such negligence was solely that of her duly licensed pilot who was in charge of the *Ophelia* within a district in which the employment of the said pilot was compulsory by law."

On July 4 and 7, 1913, the case was tried by Bargrave Deane J., assisted by two of the Elder Brethren of the Trinity House, and in delivering judgment the learned judge said:—

"My judgment will be extremely short in this matter. There was a vessel at anchor in the anchorage ground off Gravesend, another vessel coming down the river picks up her pilot at Gravesend, and then proceeds on and comes into collision with this vessel at anchor in the anchorage ground. There was a dense fog all the way. I have been speaking to the Elder Brethren and they are clear that there ought not to have been this collision. Why was it? Because the pilot did not take

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the vessel to anchor. It is suggested that it was difficult for the pilot to anchor the vessel, to find a place in a dense fog; but it appears to me and to the Elder Brethren that it is absurd to say you cannot find an anchorage ground in the river Thames. The fact was the pilot was too careless. He might have tried to find an anchorage ground, but he did not. He is responsible for it.

Therefore I must find that the fault of this vessel which brought about this collision was that of the pilot, whose employment was compulsory."

On the question of costs it was submitted, on behalf of the defendants, on the authority of *The Burma* (1), that, in a collision action, if the defendants deny that the collision was caused or contributed to by the negligence of themselves or their servants, and plead that the negligence if any (which is denied) was solely that of a compulsory pilot, and the Court finds that the collision was caused by the negligent navigation of the compulsory pilot alone, the plaintiffs' action will be dismissed with costs. On the other hand it was contended, on behalf of the plaintiffs, that the practice had been otherwise—see *The Schwan* (2)—and that that case had been followed by the learned judge himself in *The Celtic.* (3)

BARGRAVE DEANE J. I see that in the case of *The Celtic* (3) I did not follow *The Burma* (1), but that I took a line of my own, that is, that I must take the case as I find it. I am rather inclined to take that view to-day. The position is this. This ship at anchor is run into by another ship, prima facie the ship that ran into her is in fault, therefore there was justification for bringing the action, but then there is a plea of compulsory pilotage set up, and the ship has satisfied me that it was not the fault of herself or her own servants, but the fault of the pilot who was in charge. Therefore I think she ought not to pay costs. My opinion is that I shall follow *The Celtic* (3) in this case, and say that there shall be no costs.

(1) [1899] W. N. 54. (2) (1874) L. R. 4 A. & E. 187.
(3) *Shipping Gazette*, July 19, 1909.

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On July 9, upon hearing counsel on both sides, upon the defendants' application, the learned judge gave the defendants leave to appeal from the decree of July 7 in so far as such decree directed each party to bear their own costs of the action. Costs of the application to abide the result of such appeal.

1913. Nov. 5. *Laing, K.C.*, and *H. C. S. Dumas*, for the appellants (defendants), the owners of the steamship *Ophelia*. It is submitted that the learned judge in the Court below in making no "order as to costs" did not rightly exercise the judicial discretion vested in him under the Judicature Acts, and that the respondents (plaintiffs) should have been condemned in the costs of the proceedings in the Court below, in accordance with the practice laid down in a similar case, that of *The Burma* (1), and the cases mentioned therein. The old cases (see *The Daioz* (2), following *The Schwan* (3)) are in favour of the view taken in the Court below; but the Court of Appeal has held that the practice should be uniform as to costs in all Divisions of the High Court, that is, that in the absence of special circumstances costs should follow the event: see *The Monkseaton*. (4)

In effect the alleged two issues raised by the defence amount to no more than this: that the defendants deny that there was any negligence on board the *Ophelia*, but if there was negligence it was not that of themselves or their servants, and at the trial it was found that the negligence of the *Ophelia* was not that of the defendants' servants, but of the person—the pilot—whom they were by law compulsorily bound to employ. The suit ought, therefore, according to the present practice of the Court to have been dismissed with costs. In *The Swansea* v. *The Condor* (5) the Court of Appeal commented on the old rule of the Privy Council, and laid down that, in future, in successful admiralty appeals, the appellants should have the costs of the appeal. [The following cases were also referred to: *The*

(1) [1899] W. N. 54.
(2) (1877) 3 Asp. M. L. C. 477.
(3) L. R. 4 A. & E. 187.
(4) (1889) 14 P. D. 51.
(5) (1879) 4 P. D. 115.

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Batavier (1); *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2); *Sharp* v. *Wakefield.* (3)]

Batten, K.C., and *Balloch*, for the respondents (plaintiffs), the owners of the steamship *Aunis*, were not called upon.

LORD PARKER OF WADDINGTON. This is an appeal from an order of Bargrave Deane J. as to costs, which, under the express provisions of the Judicature Act, are within the discretion of the judge who decides the case, and no appeal will lie from the exercise of that discretion except by leave.

In the present case leave has been given by Bargrave Deane J., not that he has any doubt that the manner in which he exercised his discretion was the right one, but because he was told, by counsel for the applicants for leave to appeal, that it was desirable that the Court of Appeal should lay down some general rule for the guidance of Courts of first instance.

It appears to me to be impossible and wrong for us to try to lay down any rule in a matter where the judge has to exercise his discretion, beyond what has already been done by the Court of Appeal. The Court of Appeal has said that whatever might have been the practice in the Admiralty Court prior to the Judicature Act, a judge, in the exercise of the discretion now given to him, should start from the position that, if there be but one issue in the action, the successful party is prima facie entitled to costs—starting from that, he should consider the special circumstances of each case and exercise his discretion accordingly. It is not if he has exercised his discretion in the way another judge would not have done, but only if he has acted upon wrong lines or in an arbitrary manner, or in a manner which is obviously unjust, that the exercise of his discretion is subject to review.

The present case appears to me to be comparatively a simple one. There was a collision between the *Ophelia* and the *Aunis*, the *Ophelia* running into the *Aunis*, which at the time was at rest, and doing damage. The action was an action by the owners of the *Aunis* against the owners of the *Ophelia* for the damage

(1) (1889) 15 P. D. 37. (2) [1903] 2 K. B. 756.
(3) [1891] A. C. 173.

sustained. The circumstances in which the collision occurred were such that there was a presumption of negligence on the part of the persons in charge of the *Ophelia*. The statement of claim alleges various particulars of faulty navigation on the part of the *Ophelia*, and among others that a good look-out was not kept—that being the only one which would affect the owners of the defendants' vessel, provided they could prove that the navigation of the vessel was in charge of a compulsory pilot—the others relating simply to the negligence of persons in charge of the ship, in fact, faulty navigation. It was open to the defendants to put in a defence to that, saying, "We do not intend to dispute the presumption of our negligence or the negligence of those in charge of the ship, but we say that the person in charge of the ship was not ourselves or our servants, but a compulsory pilot.' That would be a good defence. In that case there would have been, I think, within the meaning of the expression I have used, a single issue and the costs would follow the decision of that issue; but, as a matter of fact, the defendants took upon themselves by their defence to prove there was no faulty navigation upon the part of anybody whatever, and that was one of the issues raised by the defence. Upon that they have failed, although they have succeeded upon the issue of compulsory pilotage. It was in these circumstances that the judge had to exercise his discretion as to costs, and I think it is clear that he intended to exercise, and did exercise, this discretion. The meaning of what he said is obvious, namely, that you must consider the facts of each particular case, and in exercising your discretion must not necessarily follow other cases where discretion has been exercised by another judge in a way which does not commend itself to your own judgment. Instead of having the costs of particular issues taxed, he takes the short cut, which I think is quite justifiable and a common one, of giving no costs on either side. Counsel for the appellants say that the learned judge has ignored the general rule about the successful party getting his costs. I do not see any evidence of that, and it was not a point put to the judge on the question of costs.

It seems to me that the judge did exercise his discretion, and, as far as I can see, he exercised it wisely and rightly, and therefore

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no appeal will lie. Certainly it seems impossible for me to suggest any more general rule for the guidance of practitioners than that which has been already laid down by the Court of Appeal.

LORD SUMNER. I agree. The first question is whether the learned judge exercised his discretion, that is, his judicial discretion. From what he said before making the order as to costs it is quite clear that he intended to exercise his discretion, and concluded that he was doing so.

The appellants can only succeed if they shew that he exercised his discretion upon some wrong principle, or disregarded some fact to which in justice he ought to have given attention. They have failed in the latter point; nor have I been able to gather what the wrong principle was upon which he is said to have acted, except that he conceived himself to be doing upon this occasion what he had done before. That was right, because what he had done before was to exercise his discretion.

The desire that the Court of Appeal should lay down a rule is one that I can well understand. Practitioners have to advise their clients, and it might be a great convenience to them if there was some hard and fast rule that under given conditions such and such a rule as to costs should be followed immutably; but that is not the law, and we have no power to lay down a rule of that kind. All that we can say is that the cases in the Court of Admiralty constantly do fall into very similar classes, and the exercise of discretion in one case, being right in that case, will correspond to the exercise of discretion in other similar cases. In that way the judge has sufficient guidance, and must use his own discretion as to whether there are special circumstances or not.

WARRINGTON J. I agree.

Appeal dismissed with costs.

Solicitors for appellants (defendants), the owners of the steamship *Ophelia: Stokes & Stokes.*

Solicitors for respondents (plaintiffs), the owners of the steamship *Aunis: William A. Crump & Son.*

T. L. M.

COUNTESS DE GASQUET JAMES *v.* DUKE OF MECKLENBURG-SCHWERIN.

1914
Feb. 9, 16.

Divorce—Practice—Restitution of Conjugal Rights—Service out of the Jurisdiction—Appearance under Protest—Act on Petition—Petition dismissed.

The amendment of the law effected by the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), relates to matters subsequent to the decree: the essence of the suit and of the decree for restitution of conjugal rights remains the same, but its consequences and effects are different.

Dicks v. *Dicks* [1899] P. 275 dissented from.

No power is given, either by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 42, or by any other section or Act, to serve a citation and petition for restitution of conjugal rights beyond the jurisdiction of the Court.

Firebrace v. *Firebrace* (1878) 4 P. D. 63 approved and followed.

Bateman v. *Bateman* [1901] P. 136 criticized.

Where service of the citation and of a sealed copy of a petition for restitution of conjugal rights had been effected abroad, an order setting aside the service was made.

Whether, in a case where service is duly and properly effected, and where no question arises as to the jurisdiction of the Court in pronouncing a decree for restitution of conjugal rights, such decree can be served out of the jurisdiction, *quære*.

Where neither party to a marriage was domiciled or resident within the jurisdiction, and their only connection with this country at the date of their marriage was that they came over here for one day for the purpose of being married, and their only matrimonial residences were abroad, the Court cannot decree restitution of conjugal rights.

There is no authority, either in the Ecclesiastical Courts before 1857, or in this Court since the Matrimonial Causes Act, 1857, was passed, for pronouncing a mere declaratory judgment, in a case which does not come within the scope of the Legitimacy Declaration Act, 1858.

The mere fact that the marriage was celebrated in England, and that the petitioner purported to be residing here at the date of the institution of proceedings, cannot give the Court power to give a declaratory judgment as to the validity of the marriage.

Rules of the Supreme Court, Order XXV., r. 5, does not apply to such a case, and it can confer no jurisdiction on the Divorce Division to make a declaration as to the validity of such a marriage.

SUMMONS adjourned into Court for argument.

The questions involved related to the jurisdiction of the Court and particularly as to service out of the jurisdiction, in suits for restitution of conjugal rights.

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On May 31, 1913, a petition was presented to the Divorce Division by the lady (then Elizabeth Tibbits de Gasquet James, widow) praying for restitution of conjugal rights, or, in the alternative, for a declaration that her marriage to Henry Borwin, Duke of Mecklenburg-Schwerin, at the Register Office, Dover, on June 15, 1911, was and is a valid and subsisting marriage.

The petition alleged, inter alia, that after the said marriage the petitioner and respondent lived and cohabited at Dresden and at Rome; that they had no issue; that on April 14, 1913, the said marriage was declared null by the High Court of Rostock in Mecklenburg-Schwerin, on the ground that it had taken place without the consent of the curator of the said Henry Borwin, Duke of Mecklenburg-Schwerin; that the petitioner was, at the date of her petition, resident at a certain hotel in London but was domiciled in Germany; and that the Duke was, at the date of the petition, resident at an address in France but was domiciled in Germany.

The respondent was served in Paris, and appearance under protest was entered on his behalf.

On August 12, 1913, his solicitors lodged his Act on Petition, the allegations in which were treated as the facts, upon the hearing for the purposes of the present summons.

These facts were (1.) that both the petitioner and the respondent were at the commencement of this suit domiciled in Germany, and that neither the petitioner nor the respondent have ever been domiciled in England; (2.) that the respondent was not at the commencement of this suit or at any time resident in England; (3.) that the petitioner was not at the commencement of this suit resident in England, or, alternatively, that she took up residence in England, if at all, for the purpose of instituting this suit; (4.) that the petitioner and respondent never had any matrimonial home or residence in England, and that they never visited England together except for the purpose of going through a form or ceremony of marriage; that, on the occasion of the said form or ceremony of marriage, the respondent arrived at Dover in the evening of June 14, 1911, and that the petitioner arrived at Dover in the morning of June 15, 1911; that the petitioner and respondent went through a form of marriage at

Dover on the said June 15, 1911, and that on the same day the respondent returned to Paris, stopping at the Hotel St. James et d'Albany; that the petitioner went to Paris on the following day; (6.) that all the proceedings in this suit were served on the respondent in Paris; (7.) that the petitioner is not a natural born British subject; (8.) that by reason of the facts hereinbefore set forth this Court has no jurisdiction to entertain a suit for restitution of conjugal rights by the respondent to the petitioner or for a declaration of the validity of the said alleged marriage; and the respondent's solicitors, referring to the affidavits and proofs to be by them exhibited in verification of what they so alleged, prayed that the petition might be dismissed.

An answer to the Act on Petition was filed by the lady's solicitor on October 14, 1913; and a reply thereto by the Duke's solicitors, dated November 17, 1913, but the allegations therein are immaterial for the present purposes.

On December 4, 1913, the present summons was issued at the instance of the petitioner's solicitor and was made returnable for January 17, 1914. As before stated, this summons was adjourned into Court for argument, but the arguments not having quite concluded on Monday, February 9, the further hearing was adjourned until the following Monday.

The summons called on the respondent or his solicitors to shew cause why the proceedings on the Act on Petition should not be stayed and the suit be directed to be heard upon such terms as to appearance, pleadings, and evidence as might be just; or, in the alternative, why the petitioner should not have twenty-one days further time to file her affidavits in answer to the Act on Petition, and why the costs of this application should not be costs in the cause, and why such further and other order should not be made as might be meet.

Hume Williams, K.C., and *Bayford*, for the petitioner in support of the summons. It is quite clear that the petitioner has not the legal status of a wife in Germany. What may be the effect in France of the German decree of nullity she does not know, but she is anxious to obtain a declaration of the English Court. It is admitted that her advisers found considerable

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difficulty in formulating a petition so as to enable her to ask for such a declaration. She might have asked for a declaration in the Chancery Division, but it was thought better to come to this Court upon a petition for restitution with an alternative prayer that the marriage was and is good in this country. It is doubtful whether this Court has jurisdiction to grant a decree of restitution of conjugal rights in a case where neither of the parties is domiciled or resident in this country, but the petitioner contends that the Court has jurisdiction to declare that this marriage was valid and that in this country at any rate the petitioner has or had the status of wife of the respondent. A decree of nullity is declaratory, rather than alterative, of status. (1) If a marriage has been celebrated in England, the Court can entertain a suit touching its invalidity: *Simonin* v. *Mallac* (2); and it would be absurd if the Court had power to disaffirm but no power to affirm a marriage. All that the Court did in the subsequent case of *Linke* (*otherwise Van Aerde*) v. *Van Aerde* (3) was to make a declaration.

[SIR SAMUEL EVANS, PRESIDENT. Was not the decree in that case in the common form?]

In *Lockyer* v. *Ferryman* (4), although the facts have no relation to the present proceedings, it appears from the report that there had been a suit for a declarator of marriage.

Sottomayor (*otherwise de Barros*) v. *de Barros* (5) is an authority for saying that a marriage may be pronounced void in proceedings instituted in the place where the contract was made. [*Niboyet* v. *Niboyet* (6) was also referred to.]

If it should be contended that the Rules of this Court do not provide for any such declaration as the Court is now asked to make, the answer, as was pointed out by Sir Gorell Barnes in *Giles* v. *Giles* (7), is that the Divorce Court Rules are not exhaustive, and, if that is a correct statement of the law, then the Rules of the Supreme Court, Order xxv., r. 5, should be applied by the Court in the present case.

(1) Rayden on the Practice and Law in the Divorce Division, p. 14, par. 32.

(2) (1860) 2 Sw. & Tr. 67, at pp. 74, 76, 77, and 79.

(3) (1894) 10 Times L. R. 426.

(4) (1877) 2 App. Cas. 519.

(5) (1877) 2 P. D. 81, at p. 86.

(6) (1878) 4 P. D. 1, at p. 9.

(7) [1900] P. 17, at p. 18.

The Court is not asked to go so far in the present case as it did in the case of *De Montaigu* v. *De Montaigu.* (1)

[SIR SAMUEL EVANS, PRESIDENT. That case went pretty far.]

If this Court can declare a marriage contract to be null and void, it must also have jurisdiction to declare that the marriage was good at the time it was contracted.

[SIR SAMUEL EVANS, PRESIDENT. Could the respondent come to this country and ask to have it annulled?]

It is submitted that he could. *Simonin* v. *Mallac* (2) is in point. [They also referred to Pritchard's Digest (3) and the cases there cited.]

Barnard, K.C., and *J. G. Archibald*, for the respondent. This question does not arise upon the construction of the Rules. It is a question of what jurisdiction this Court has under certain Acts of Parliament: the Matrimonial Causes Act, 1857 (4), ss. 2, 6, are the first sections in point. The only suits over which this Court is given jurisdiction are specified in those sections, except suits created by the Act itself. What suits could have been brought in the Ecclesiastical Courts in which a declaration could be made such as that now asked? Where does this Court derive the power to make a declaration as to the validity of a marriage? The only Acts are the Legitimacy Declaration Act (5) and the Greek Marriages Act. (6) It cannot be suggested here that this is a petition under either of those Acts.

For the purposes of the present summons every statement in the Act on Petition must be taken as accurate. [Act on Petition read.]

If the petitioner instituted a suit for nullity of marriage, a declaration might in effect be obtained by the dismissal of such a suit, but unless the domicil of the husband is in England, or there is a matrimonial home in England, or if the respondent has been served in England, there is no jurisdiction to entertain a suit for nullity: *Yelverton* v. *Yelverton* (7), which

(1) [1913] P. 154.
(2) 2 Sw. & Tr. 67.
(3) 3rd ed. (1874) at p. 66.
(4) 20 & 21 Vict. c. 85.
(5) 21 & 22 Vict. c. 93.
(6) 47 & 48 Vict. c. 20.
(7) (1859) 1 Sw. & Tr. 574, at pp. 585, 586, and 590.

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was approved by Sir James Hannen in *Firebrace* v. *Firebrace*. (1) Notwithstanding those decisions the present proceedings were served on the respondent out of the jurisdiction. Sects. 41 and 42 of the Matrimonial Causes Act, 1857 (2), do not include suits for restitution, and there is no power to serve a citation and petition in a restitution suit out of the jurisdiction. The Act on Petition in the present case states that service was effected on the respondent in Paris. In *Chichester* v. *Chichester* (3) the citation and petition were served on the respondent in Dresden, and upon an application to set aside the service Sir James Hannen set it aside. No reasons are, however, given in his judgment as reported.

After those decisions the Matrimonial Causes Act, 1884 (4) was passed abolishing the power to enforce a decree by attachment, and giving by s. 5 a substituted remedy. In these altered circumstances the question arose in *Bateman* v. *Bateman* (5), where the husband was a domiciled Englishman but had gone abroad, whether the Court would allow the citation and petition to be served upon him out of the jurisdiction. There is no report of the case upon that application. (*Barnard, K.C.*, stated that he was in the case with Mr. Inderwick, K.C., and his recollection was that the application was made in chambers, and so was not reported.) The petition subsequently came on for hearing before Sir Gorell Barnes, who states in his judgment the fact that the order in regard to service had been obtained. As to whether the practice of allowing such a citation and petition to be served out of the jurisdiction can be supported, Sir Francis Jeune only made the order in that case on the condition that the respondent was sworn to be a domiciled Englishman, and therefore it is not necessary to argue that *Bateman* v. *Bateman* (5) was wrong in law.

Armytage v. *Armytage* (6) went one step further than any of the other cases.

This is not a suit for nullity. *Simonin* v. *Mallac* (7) and

(1) 4 P. D. 63, at pp. 66 and 68.
(2) 20 & 21 Vict. c. 85.
(3) (1885) 10 P. D. 186.
(4) 47 & 48 Vict. c. 68.
(5) [1901] P. 136.
(6) [1898] P. 178.
(7) 2 Sw. & Tr. 67.

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Sottomayor v. *de Barros* (1) were suits for nullity. *Niboyet* v. *Niboyet* (2) was a suit for divorce, but the decision in that case is no longer law, having been overruled so far as it applied to questions of divorce by the case of *Le Mesurier* v. *Le Mesurier*. (3)

It is only under the Legitimacy Declaration Act that the Court has power to make the declaration for which the petitioner applies. The Attorney-General cannot be made a party to the present proceedings, as he must be in proceedings under the Legitimacy Declaration Act.

Can a declaration be claimed in any other kind of suit? The experiment has been tried in a probate suit: *Warter* v. *Warter*. (4)

[SIR SAMUEL EVANS, PRESIDENT. Why am I asked to determine these matters upon a summons?]

The petitioner took out the summons, but, although it is submitted that that was not the right course, no point is raised as to the procedure adopted.

Declaratory actions are quite common in Scotland (5): *Earl of Mansfield* v. *Stewart*. (6) The Common Law Courts in England never had jurisdiction to make declarations, and even in the Chancery Courts, at any rate before 1852, declarations were only made where substantive relief was sought in addition to the declaration asked for: *Barraclough* v. *Brown*. (7) The petitioner is challenged to produce any case where such a declaration has been made in this Court or in the Ecclesiastical Courts. Although *Simonin* v. *Mallac* (8) has been acted upon in other cases, it was wrong in principle and must not be extended: Dicey, Conflict of Laws (9); Westlake, Private International Law. (10) The Rules of the Supreme Court (11) do not provide for service out of the jurisdiction in such a case as this. The mere fact that a contract is made in one country gives no right of

(1) 2 P. D. 81.
(2) 4 P. D. 1.
(3) [1895] A. C. 517.
(4) (1890) 15 P. D. 35, at p. 36.
(5) Bell's Dictionary of the Law of Scotland, Declarator.
(6) (1846) 5 Bell, 139.
(7) [1897] A. C. 615, at p. 623.
(8) 2 Sw. & Tr. 67.
(9) 2nd ed., p. 269, footnote 2.
(10) 5th ed., p. 98.
(11) Order XI., r. 1.

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itself to have a declaration as to that contract in the same country: *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote.* (1)

Order xxv., r. 5, is not an authority in favour of the petitioner, but rather of the respondent.

There is no hardship here as was apparent in *Stathatos* v. *Stathatos* (2) and *De Montaigu* v. *De Montaigu* (3), and moreover in those cases the Court had jurisdiction.

Bayford in reply. The Court has power to serve a citation and petition out of the jurisdiction even in the case of a foreigner: *Rayment* v. *Rayment and Stuart*; *Chapman* v. *Chapman and Buist.* (4)

There may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, although it does not follow that such residence would be sufficient to give jurisdiction to dissolve a marriage: *Le Mesurier* v. *Le Mesurier.* (5) The petitioner in the present case was in fact resident here at the time of the institution of her suit.

It has been suggested that the only proper proceedings to obtain a declaration would be under the Legitimacy Declaration Act, but that Act has nothing whatever to do with the present suit. It introduced a new jurisdiction altogether and its whole object was to declare a person legitimate. This is shewn by the preamble to the Act.

[SIR SAMUEL EVANS, PRESIDENT, referred to the second part of s. 1 of the Act, and pointed out that the preamble cannot narrow the Act itself, and that it was repealed in 1892 by the Statute Law Revision Act. (6) The preamble, when looked at, is much more limited than the section itself. What do you say about the Greek Marriages Act, 1884? (7)]

That was a special Act of Parliament dealing with a particular class of marriages.

As to the challenge to produce a case in which the Ecclesiastical Court made a declaration, *Miles* v. *Chilton* (*falsely calling herself Miles*) (8) is such a case. That was a case of a bigamous

(1) [1894] A. C. 670.
(2) [1913] P. 46.
(3) [1913] P. 154.
(4) [1910] P. 271.
(5) [1895] A. C. 517, at p. 531.
(6) 55 & 56 Vict. c. 19.
(7) 47 & 48 Vict. c. 20.
(8) (1849) 6 Notes of Cases, 636; 1 Rob. 684.

marriage, and the Court was asked to declare whether the marriage was valid or not. It was suggested in that case that, the parties having married with knowledge of all the facts, there was ground for refusing to make a decree as to the invalidity of the marriage in question.

On the question raised in argument by the opposite side that the Courts cannot make a declaration alone, *Chapman* v. *Michaelson* (1) decided that the Court had power to give a declaratory judgment although no ancillary relief was claimed.

[SIR SAMUEL EVANS, PRESIDENT. That was under Rules of the Supreme Court, Order XXV., r. 5, but that Order does not apply to matrimonial suits in this Division.]

It does not apply strictly to this Division, but Sir Gorell Barnes in a matrimonial suit pointed out that the Divorce Court Rules were not exhaustive, and that the practice under the Rules of the Supreme Court ought to be followed where no special divorce rule was applicable: *Giles* v. *Giles*. (2) In *Harvey* v. *Lovekin* (*otherwise Harvey*) (3), which was a nullity case, the practice of the other Divisions was applied.

The whole practice in restitution suits has been amended by the Matrimonial Causes Act, 1884. (4) Before that an order for restitution of conjugal rights, which was enforceable by attachment, was not made where the respondent was out of the jurisdiction. After the remedy by attachment was gone there was no longer any reason for refusing a decree merely because the respondent was out of the jurisdiction, and there is no reported case where the Court has refused to make a decree on that ground since 1884. *Bateman* v. *Bateman* (5) and *Dicks* v. *Dicks* (6) shew that the Act of 1884 has entirely altered the situation.

[SIR SAMUEL EVANS, PRESIDENT. The alterations are in matters subsequent to decree: the decree remains the same, but the consequences are different. The statement of Sir Gorell Barnes in *Dicks* v. *Dicks* (6) to the effect that the Act of 1884 "entirely altered the law with respect to restitution of conjugal rights" (7) seems too sweeping.]

(1) [1909] 1 Ch. 238.
(2) [1900] P. 17, at p. 18.
(3) (1884) 10 P. D. 122.
(4) 47 & 48 Vict. c. 68.
(5) [1901] P. 136.
(6) [1899] P. 275.
(7) [1899] P. at p. 277.

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It is submitted on behalf of the petitioner that there is jurisdiction to make the declaration asked for, whatever the domicil, wherever the residence, and wherever the service. *Taplin* v. *Taplin and Holland* (1) is another illustration of the Rules of the Supreme Court being made applicable to proceedings in a divorce suit.

[SIR SAMUEL EVANS, PRESIDENT, upon this referred to *Wilkins* v. *Wilkins* (2) and *Allen* v. *Allen and Bell.* (3)]

SIR SAMUEL EVANS, PRESIDENT. This case has been fully argued to-day and on Monday last, and I am prepared to deliver my judgment now: it is not necessary for me to reserve it.

This is an application by a summons in chambers, which is adjourned into Court for argument, for an order to stay the proceedings upon the Act on Petition which has been filed in the suit by the respondent. The relief asked for by the petitioner in the suit is, first of all, that a decree of restitution of conjugal rights may be made in her favour against the respondent; and, in the alternative, that a declaration be made that the marriage of the petitioner with the respondent was and is a valid and subsisting marriage. The facts which are alleged in the Act on Petition for the purposes of this application must, of course, be taken to be true; and, indeed, so far as I have been informed, they are in fact true: there is no dispute about them.

The facts are shortly these: The Duke of Mecklenburg and the Comtesse de Gasquet James married in England. They came over from the Continent to Dover just for the celebration of the marriage, and returned again at once to the Continent. The domicil of the Duke was German. Up to the time of the marriage the domicil of the Comtesse appears to have been French. After the marriage she took her husband's domicil. Neither of the parties has ever had a domicil in England. Neither of them has ever had a residence in England.

In 1913 the marriage was declared to have been and to be null and void by a decree of a German Court of competent jurisdiction; and it is admitted that such a decree was validly made. The

(1) (1888) 13 P. D. 100. (2) [1896] P. 108.
(3) [1894] P. 248.

petitioner subsequently commenced these proceedings in this Court, asking for the relief already described, on the ground that the marriage ceremony had been performed in this country, and in accordance with its forms. She had no residence here at the time the suit was commenced. The citation and the sealed copy of the petition were served on the respondent abroad. He entered an appearance in this Court under protest, and duly filed his Act on Petition. The points raised by the Act on Petition are: (1.) That this Court had no jurisdiction to serve the respondent abroad, and that the service out of the jurisdiction is bad, and should be set aside; (2.) that this Court has no jurisdiction to entertain the suit for restitution of conjugal rights against the respondent; and (3.) that this Court has no jurisdiction to entertain the suit for a declaration of the validity of the marriage. The petitioner asks that all proceedings on the Act on Petition should be stayed, as it discloses no answer to her claims.

The first question, therefore, is whether it was competent for this Court to serve the respondent with the citation and petition in this suit outside the jurisdiction. If not, the service must be set aside, and with that the whole proceedings would at once come to an end, and the petition would have to be dismissed.

The jurisdiction of this Court in suits for restitution of conjugal rights was conferred by the statute of 1857, by which "the Court for Divorce and Matrimonial Causes" was created. By that statute all jurisdiction which had up to then vested in or been exercisable by any Ecclesiastical Court or person in England in respect (inter alia) of suits for restitution of conjugal rights was vested in Her Majesty the Queen, and such jurisdiction together with the jurisdiction conferred by that Act itself was to be exercised in the name of Her Majesty in this Court (s. 6). In such suits the Court was to proceed and act and give relief on principles and rules which in the opinion of the Court should be as nearly as might be conformable to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief, but subject to the provisions of the Act and to the Rules and Orders under the Act (s. 22). By the Matrimonial Causes Act, 1884 (1), material alterations were made regarding suits for

(1) 47 & 48 Vict. c. 68.

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restitution of conjugal rights, the most important of which were the abolition of the power to enforce decrees for restitution by attachment, and the enactment that failure to comply with a decree would be deemed to be desertion without reasonable cause, entitling the petitioner to pursue remedies grounded upon desertion forthwith, without waiting for a period of two years. The Act does not appear to affect the question of service of process. It is abundantly clear that the Ecclesiastical Courts in suits for restitution exercised no power, and could exercise no power, outside their own narrow jurisdictions. The authority of the Court as to service of process in such suits must therefore be looked for in, and derived from, the 1857 Act (1) itself, or rules made under it. "If service of the process of the Court is necessary for the jurisdiction of the Court, the Court cannot, except so far as it is authorized by statute, order service abroad. The effect of a statute which gives it that power does not affect, of course, the laws of other countries or the questions of international law which may be raised; but, as far as the Courts of this country are concerned, the statutes of the realm are supreme." That is Bowen L.J.'s language in *In re King & Co.'s Trade Mark* (2); and, as Lord Lindley, when Master of the Rolls, said in *Pemberton* v. *Hughes* (3), "The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit."

So far from authorizing the service of the citation and sealed copy of the petition in a restitution suit upon a respondent abroad, it is, in my judgment, a clear consequence of the provisions of the Act, that such service is not authorized. Sect. 42 of the Act deals with the service of petitions in suits for nullity of marriage, for judicial separation, for dissolution of marriage, and for jactitation of marriage. This follows from the necessary reading of s. 42, with s. 41. "Such petitions" can be served "either within or without Her Majesty's dominions." But a petition in a suit for restitution of conjugal rights is not "such a petition." Its absence is the more noticeable from ss. 41 and 42, as it had been associated with the other suits in ss. 2 and 6

(1) 20 & 21 Vict. c. 85. (2) [1892] 2 Ch. 462, at p. 483.
(3) [1899] 1 Ch. 781, at p. 792.

of the same Act. It has been suggested that the omission was per incuriam. I do not think so. The very nature of the remedy asked for, namely, an order upon the respondent to be originally enforced by attachment in case of disobedience—"to return home to the petitioner and render to her conjugal rights"—would seem to be a reason for not allowing service on a respondent who was not within the jurisdiction of the Court. However this may be, one looks in vain in the Act for any authority to serve the citation and petition abroad; and looking at the Act alone, I should come to the conclusion that the Court has no jurisdiction to serve the respondent abroad. But there have been some cases in the Court to which I must advert, and which require examination. The latest in date is *Bateman* v. *Bateman*. (1) In that case Sir Francis Jeune apparently gave leave to serve the citation and petition out of the jurisdiction "subject to the filing of an affidavit by the petitioner to the effect that her husband was domiciled in England"; and accordingly service was effected in Vancouver. There does not appear to have been any argument upon the question of jurisdiction, and the report does not shew whether Sir Francis Jeune thought that the suit for restitution lay against the respondent because he was a domiciled Englishman, and that, as the suit lay, service could be effected abroad; or, that service could be effected out of the jurisdiction because of the domicil. It had become settled law before that case that domicil was not necessary in order to found a suit for restitution of conjugal rights: that residence here (at any rate of both parties) at the time of the suit was enough. Subsequently Sir Gorell Barnes heard the case, and pronounced the decree, which was served out of the jurisdiction. I do not think that this case can properly be regarded as a decision that the citation and petition in a suit for restitution can be served out of the jurisdiction; and, in any event, it is not binding in the facts of the case now before the Court; because in *Bateman* v. *Bateman* (1) the husband and wife were married in England, and had resided in England for years, and the domicil of both was English.

In the part taken by Sir Gorell Barnes in *Bateman* v.

(1) [1901] P. 136.

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Bateman (1), the learned judge said he was following the decision in *Dicks* v. *Dicks* (2), which he had decided a couple of years before. This again was an undefended suit, and there was accordingly no argument for the respondent. It is not an authority for the proposition that the citation and petition can be served abroad; because the service was effected in London. Moreover, the respondent was domiciled in England and had his residence here. The decree for restitution, however, was served on him in Dublin (which, for this purpose, is a foreign city). A subsequent service of the decree at Chester was not material. Sir Gorell Barnes said (3): "From my examination of the cases, and considering the matter as it stands now, since the Act of 1884 was passed, and having regard to the fact that this gentleman was domiciled in this country, I do not see that the service upon him in Ireland of the order in the restitution suit affects the petitioner's rights in this case." And, after referring to the case of *Pearson* v. *Pearson* (4), "where it was directed that the decree for restitution of conjugal rights should be served upon the respondent (who was then in Shanghai) on his return to England," the learned judge said: "but I do not think that case really affects the present question at all. The Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), entirely altered the law with respect to restitution of conjugal rights."

No doubt very material alterations of the law were introduced by that statute; but it is not pointed out, and I am unable to see, how it altered or affected the law as to service out of the jurisdiction. Although the statute converted the disobedience of the decree into a kind of "statutory desertion," and although in practice the use made of the statute has been, in the vast majority of cases, to establish such desertion as a preliminary to other proceedings, it cannot be that the Court is to be regarded as pronouncing a decree and making an order on the husband to return home to the wife and render to her conjugal rights without intending it to be an effective order. The consequences of disobedience are different, but the essence of the suit, decree, and order remains the same.

(1) [1901] P. 136.
(2) [1899] P. 275.
(3) [1899] P. 275, at p. 277.
(4) (1864) 33 L. J. (P. & M.) 157.

The next case I will refer to is *Firebrace* v. *Firebrace*. (1) That decision was one of great importance upon two of the matters arising in the present suit. The respondent was of Australian domicil, and the marriage took place in Australia. He and his wife lived in England for some years, but he never had any permanent residence here, and his domicil of origin was not changed. He had left England and returned to Australia before the suit was commenced. Apparently he was served out of the jurisdiction. He appeared under protest, and afterwards, by Act on Petition, objected to the jurisdiction. It was held by the President, Sir James Hannen, that the Court had no jurisdiction to entertain the suit against a foreigner after he had left this country: to use his own words (at p. 67), "No decision has been brought to my notice where the jurisdiction of this Court has been asserted against a foreigner after he had quitted this country for not rendering conjugal rights to his wife while here; and it appears to me that the Court has not jurisdiction in such a case." He also decided that s. 42 of the 1857 Act does not authorize service abroad of a petition for restitution, and says in terms (at p. 69) that "no power is given by the Act to serve such a petition out of the jurisdiction."

The case of *Yelverton* v. *Yelverton* (2), so far as it deals with the question of service, was examined and dealt with by Sir James Hannen in this case; and no further reference to it is necessary.

The same learned President acted upon his decision in *Firebrace* v. *Firebrace* (1) in the case of *Chichester* v. *Chichester* (3), where he set aside the service of a restitution petition, apparently solely on the ground that it was effected out of the jurisdiction. It does not appear from the report what was the domicil or place of residence of the parties. This decision was in 1885, about six months after the passing of the Matrimonial Causes Act, 1884 (4), and it was not suggested that the Act made any difference upon this point.

Notwithstanding what was said by Sir Gorell Barnes in *Dicks* v. *Dicks* (5), it does not appear to me that the Act made any

(1) 4 P. D. 63.
(2) 1 Sw. & Tr. 574.
(3) 10 P. D. 186.
(4) 47 & 48 Vict. c. 68.
(5) [1899] P. 275, at p. 277.

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alteration in the law upon any question relating to the jurisdiction of the Court to entertain the suit, or its jurisdiction to allow a suit to be commenced by service of the petition abroad. The alterations and modifications enacted by the statute related to matters after a decree has been pronounced in the suit.

It must not be thought that I am dissenting in any way from the course adopted by Sir Gorell Barnes in the later proceedings in *Bateman* v. *Bateman*. (1)

It is not necessary to decide whether, if the citation had been properly served and the Court had jurisdiction to make a decree, that decree could be served on the respondent abroad. That question has not been argued, and I pronounce no opinion upon it.

For the reasons I have given, having regard to the nature of the suit, and to the statutes vesting the jurisdiction in this Court, and also to the decisions, I am of opinion that the Court had no power to serve the citation and petition upon the respondent abroad, and accordingly he is entitled to have the service set aside, and I order it to be set aside accordingly.

This is enough to dispose of the case.

But even supposing that the service was good, there are difficulties in the way of the petitioner under the two other heads of objection set out in the Act on Petition, and as these matters were argued, I will deal with them shortly.

The second point is: That the Court has no power to entertain the suit for restitution in the facts of this case. The respondent was not domiciled here; he was not resident here when the suit commenced, and never had resided here. The petitioner was in the like case in every respect. The only connection of the parties with this country was that they came over here for one day only to celebrate the marriage. In my judgment it is clear that, in these circumstances, the Court could not decree restitution of conjugal rights against the respondent. I have already called attention to the decision upon this point in *Firebrace* v. *Firebrace* (2), in discussing the first part of this case, and I will not repeat what I said. But, in another part of his judgment, Sir James Hannen (at p. 68) said: "She"

(1) [1901] P. 136. (2) 4 P. D. 63.

(the petitioner) "prays that the English law shall be put in force against him; but as the obligation of a foreigner to obey the laws of this country lasts no longer than the time during which he is within its jurisdiction, the tribunals of this country cannot call upon him to obey those laws after the obligation has ceased. The difficulty, amounting in most cases to an impossibility, of enforcing the decree of the Court in the circumstances of the present case lends additional force to the arguments against the existence of the jurisdiction."

Upon this part of the case, accordingly, the respondent also succeeds on his Act on Petition.

The third question is whether this Court can entertain a suit for a declaration that the marriage in England, in accordance with the forms necessary for a marriage here, is a valid marriage.

It was contended for the petitioner that the Court can give a declaratory judgment. Firstly, it was argued, on the authority of dicta in cases for decrees of nullity, e.g., in *Simonin* v. *Mallac* (1) and *Linke* v. *Van Aerde* (2), that as the Court could decree a nullity of marriage, it could declare the validity of a marriage. And, secondly, it was argued that the Court could give a declaratory judgment on the question of the validity under Order xxv., r. 5, of the Rules of the Supreme Court.

As to the first contention, no authority was, or could be, given for the proposition that the Ecclesiastical Courts ever pronounced such a declaratory judgment; and no case has happened since the Act of 1857 (3) where this Court has done so.

In 1846, Lord Brougham in delivering his opinion in the House of Lords in the case of *Earl of Mansfield* v. *Stewart* (4) said: "I cannot close my observations in this case without once more expressing my great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy, under it, the security and the various facilities and conveniences which they have from that most beneficial and most admirably contrived form of proceeding called a declaratory action. Here, you must wait till a party chooses to bring you into Court; here, you must wait till possibly

(1) 2 Sw. & Tr. 67, at p. 74.
(2) 10 Times L. R. 426.
(3) 20 & 21 Vict. c. 85.
(4) 5 Bell, 139, at p. 160.

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your evidence is gone; here, you have no means whatever, in ninety-nine cases out of a hundred, of obtaining the great benefit of this proceeding." And three years later—in 1849—Lord Brougham presented a Bill to the House of Lords for the purpose of importing into England the Scottish action of "declarator." In introducing the Bill, Lord Brougham spoke thus: "As the law of England stands at present, there are no means by which a man can of himself obtain a judicial declaration of particular rights, such as his marriage, his legitimacy, or any other matter he wishes to establish. In Scotland, by a declaratory action, a party can obtain the opinion of the Court of Session on any question he finds it necessary to raise; on a question affecting, for example, his marriage or his legitimacy." The Bill, however, did not become law.

After the passing of the Matrimonial Causes Act, 1857 (1), however, the Legitimacy Declaration Act, 1858 (2), was passed. By this Act (inter alia) it was enacted that any natural-born subject of this realm, or any person whose right to be deemed a natural-born subject depends wholly or in part on the validity of a marriage, being domiciled in England, may apply by petition to this Court praying for a decree declaring that his marriage was or is a valid marriage; and the Court is to have jurisdiction to hear and decide such application, and to make such decree declaratory of the validity or invalidity of such marriage. In any such proceeding the Attorney-General is to be notified, and becomes a respondent upon the hearing of the petition, and upon every subsequent proceeding relating thereto.

The persons entitled to apply for a declaration of validity of a marriage were specified in the Act. The petitioner in this case does not come within the category of such persons.

In proceedings taken under the Legitimacy Declaration Act the Attorney-General becomes a party to protect the interests of the Crown and the public.

It is clear that the petitioner in this case could not, under the 1858 Act, bring an action for such a declaration of validity. And the very fact that the right to petition for such a declaration is specially created by the Act shews that, apart from and outside

(1) 20 & 21 Vict. c. 85. (2) 21 & 22 Vict. c. 93.

it, such suits could not be maintained. The petitioner, therefore, cannot petition under the Act. If the suit were brought, the Attorney-General could not be made a respondent.

No action in the Ecclesiastical Courts was brought to my notice where a suit was instituted for a declaratory judgment.

The Act of 1858 obviously negatives any right in a petitioner to petition for a declaration of validity outside the Act, and without bringing in the Attorney-General.

I am of opinion that the petitioner has not derived any right to petition for a declaration of the validity of the marriage, either from the practice of the Ecclesiastical Courts or under any statute.

With regard to the only remaining contention, that the Court is empowered to grant a declaratory judgment by Order xxv., r. 5, it is to be observed that that rule is not applicable to this Court, as the Rules of the Supreme Court do not affect or govern proceedings in this Division; and in no Division of the Supreme Court, in any event, could such a rule give a right to petition so as to create a jurisdiction in the Court which otherwise did not exist: *Barraclough* v. *Brown*. (1)

Upon this third head, accordingly, the respondent is entitled to succeed also.

The summons to stay raises the question of whether the Act on Petition discloses any answer to the petitioner's suit. The parties agree to take the decision on this summons as if it had been made on the hearing of the Act on Petition.

The result is that, on the various grounds I have stated, the respondent is entitled to succeed in the Act on Petition, and the petition in the suit stands dismissed.

[Upon an affidavit as to the petitioner having substantial separate estate, which was not, in fact, disputed, the petitioner was ordered to pay the costs of the respondent.]

Solicitor for petitioner (wife): *Cecil J. Mercer.*

Solicitors for respondent (husband): *Charles Russell & Co.*

(1) [1897] A. C. 615, at p. 623.

H. D. G.

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Oct. 24;
Dec. 16.

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[1912 B. 1968.]

Admiralty—Collision—Damage—Repairs—Strike of Workmen—Loss of Use of Vessel—Proximate Cause—Natural and probable Consequence—Remoteness.

By reason of a collision, due to the negligence of those in charge of another vessel, the plaintiffs' vessel was obliged to go into dry dock to repair the damage sustained, and, whilst there, delay occurred owing to a strike of workmen. On objection, on the ground of remoteness, to the allowance by the registrar of an item in the plaintiffs' claim in respect of this delay:—

Held by the President (Sir Samuel Evans), that the item, covering the loss of the use of the vessel during the period of the strike, was properly allowed in accordance with the principles of the common law, for the loss flowed directly, naturally, and in the usual or ordinary course of things from the proximate cause, namely, the negligence of the defendants in bringing about a collision with the plaintiffs' vessel, and thereby rendering it necessary to dry-dock her for the purpose of repair.

Petition in objection to the registrar's report on a reference arising out of an action of damage by collision.

The plaintiffs were the Buenos Aires and Pacific Railway Company, Limited, owners of the steamship *Don Benito*.

The defendant petitioners were Captain H. F. P. Sinclair, R.N., and Lieutenant W. Scott, R.N., officers (at the material time) in charge of H.M.S. *London*.

By consent of parties, the amount of damage sustained by the plaintiffs, by reason of the collision in question in the action, was referred to the registrar, assisted by merchants, for assessment on the basis of the liability of the defendants for 50 per cent. thereof.

On July 1, 1913, the registrar reported that he had examined the claim, filed on behalf of the plaintiffs, amounting to 9474*l.* 4*s.* 11*d.*, and had allowed 6608*l.* 5*s.* 6*d.*, of which one half, amounting to 3304*l.* 2*s.* 9*d.*, was due to the plaintiffs, with interest at 4 per cent., and costs.

Item No. 29 of the claim was "for loss of use of vessel" and amounted to 5748*l.* 9*s.* 4*d.*, of which sum the registrar had allowed a moiety of 3115*l.*

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The facts were agreed and fully appear from the following terms of the petition filed on July 31 on behalf of the defendants:—

1. This is an appeal from the registrar's report, in which damages were allowed in respect of loss and expense incurred by the plaintiffs, the owners of the s.s. *Don Benito*, in consequence of a strike, and the only question on the appeal is the question of law whether such damages are recoverable from the defendants.

2. At about 11.45 P.M. on May 11, 1912, H.M.S. *London*, whilst in charge of the defendants, collided with the plaintiffs' steamship *Don Benito* in the English Channel off Hythe. An action was afterwards instituted in this Honourable Court by the owners of the *Don Benito* to recover from the defendants in respect of the damage caused by the said collision, and was settled on the terms that the defendants pay 50 per cent. of the plaintiffs' claim, and that the claim, if not agreed, should be referred to the registrar and merchants for assessment. The claim was not agreed and was accordingly referred to the registrar and merchants.

3. At the time of the collision the *Don Benito* was on a voyage from Antwerp to Newport (Mon.) in water ballast, but in consequence of the damage received she proceeded towards Hythe, and after anchoring there she was assisted by tugs into Dover. At Dover the watertight doors in the bulkhead between No. 2 hold and the stokehold were made watertight, and No. 1 bulkhead was well shored, and on the morning of May 15 she left Dover for London under convoy of a tug, and at about midnight she was placed in the Deptford dry dock. She was surveyed by surveyors representing all the parties interested, and the damage caused by the collision was noted, and it was agreed by all the surveyors that eighteen working days was a reasonable time for the necessary repairs.

4. On May 17 the Deptford Dry Docks Company, Limited, made a contract in writing with the plaintiffs by which they agreed to do the repairs in eighteen working days, and the contract contained the following words, namely: "Owing to circumstances that may arise in regard to weather and labour

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troubles we cannot guarantee a time to complete the work, but are going to do our very utmost to complete the work in eighteen weather working days."

5. The repairs were begun on May 18, and on May 31, before the repairs were completed or the eighteen working days had expired, a strike began in London of workmen necessary for the repairs and continued till about July 20, and in consequence of the strike the repairs were not completed till August 10. If there had been no strike the repairs would have been completed in eighteen working days from May 18.

6. The petitioners do not dispute that it was reasonable for the plaintiffs to take the *Don Benito* to London and repair her there.

7. At the reference it was contended on behalf of the defendants that they were not liable for the loss of time caused by the said strike, but this contention was not upheld by the registrar for the reasons stated in his report.

8. The petitioners humbly submit that their said contention is right, and they pray this Honourable Court not to confirm the said report but to direct that the defendants are not liable for the loss of time caused by the strike, and to send back the said report to the registrar to assess the damages in accordance with such direction, and to order that the plaintiffs pay the costs.

The contentions raised on behalf of the defendant petitioners as to their non-liability for the loss of time and expenses consequent on the delay caused by the strike appear from the following "registrar's reasons" for his report:—

The *Don Benito* was taken into Dover to the inner harbour and there beached. She was temporarily repaired, and then taken to the Thames for permanent repairs. Owing to a strike of workmen in the Thames the repairs were not completed till August 10.

The defendants contend (1.) that they were not liable for the expenses consequent on the *Don Benito* going to the inner harbour at Dover, as it was not reasonable to go there; (2.) that the *Don Benito* should have been taken to a port on the north-

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east coast for repairs; and (3.) that they were not liable for the loss of the time caused by the strike. As regards (1.) and (2.) we find that under the circumstanes the conduct of the plaintiffs was reasonable. As regards (3.) I am of opinion that the plaintiffs should recover compensation for the time which was lost through the repairs being delayed by the strike. Plaintiffs are entitled to any losses caused to them by the non-use of their ship owing to the collision, and not arising through their own default. The work of the repairers was at first stopped, and later, when the strike was coming to an end, made much slower by the action of the workmen on the Thames. But for the collision, the *Don Benito* would not have had to be repaired. The cause of the delay in the repairs was not contributed to by the plaintiffs, and the delay was directly connected with the work of the repair. If workmen have to cease work on account of bad weather, or breakdown of machinery, so that the operation of repair is prolonged, the plaintiffs are clearly entitled to recover in respect of such lengthened time. The prolongation of the work caused by a strike seems to me analogous to the above instances. The loss of time was in fact directly connected with the collision. If the case be regarded from the point of view as to what events were within the contemplation of the parties, it is impossible to doubt that in respect of repairs the possibility of delay by strikes would certainly be in the minds of the defendants. It should be stated that as the *Don Benito* had been "stemmed" for dry docking she was in the same position legally as a vessel bound in consequence of a prior collision to go into dry dock, and *The Haversham Grange* (1) therefore applies. The consequent deduction is small in comparison with the amount of loss caused by the strike, but it has been duly made.

The *Attorney-General* (*Sir John Simon, K.C.*) and *C. Robertson Dunlop*, for the defendant petitioners, Captain Sinclair and Lieutenant Scott.

Bateson, K.C., and *Hugh C. S. Dumas*, for the plaintiffs, the owners of the *Don Benito*.

(1) [1905] P. 307.

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The arguments of counsel sufficiently appear from the registrar's "reasons" and the following judgment.

Cur. adv. vult.

1913. Dec. 16. The President (Sir Samuel Evans). The facts in this case are not in dispute. A statement of them has been agreed between the parties, and is to be found in the petition praying for a modification of the registrar's report upon the reference as to damages.

The question arising for decision is whether the plaintiffs are entitled, as part of their damages resulting from a collision at sea, to a sum for the detention or loss of the use of their vessel during the portion of the time she was in a dry dock undergoing repairs, when the actual work of repair was suspended by reason of a strike.

The defendants contended that such damages were too remote to be recoverable in law. The doctrine of legal causation, in reference both to the creation of liability and to the measurement of damages, has been much discussed by judges and commentators in this country and in America. Vast numbers of learned and acute judgments and disquisitions have been delivered and written upon the subject. It is difficult to reconcile the decisions; and the views of prominent commentators and jurists differ in important respects. It would not be possible or feasible in this judgment to examine them in anything approaching detail.

The Court is not concerned in the present case with any inquiry as to the chain of causes resulting in the creation of a legal liability from which such damages as the law allows would flow. The tortious act—i.e., the negligence of the defendants which imposes upon them a liability in law for damages—is admitted. This gets rid at once of an element which requires consideration in a chain of causation in testing the question of legal liability, namely, the foresight or anticipation of the reasonable man. In *Smith* v. *London and South Western Ry. Co.* (1) Channell B. said: "Where there is no direct evidence of negligence, the question what a reasonable man might foresee is

(1) (1870) L. R. 6 C. P. 14, at p. 21.

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of importance in considering the question whether there is evidence for the jury of negligence or not . . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." And Blackburn J. in the same case said: "What the defendants might reasonably anticipate is only material with reference to the question, whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence."

In the present case we start with the admitted tort of the defendants, and have only to consider what are the consequential damages. It is settled law that the rule as to the remoteness of damage is the same whether the damages are claimed in actions of contract or of tort: *The Notting Hill* (1); and that the damages recoverable from a wrong-doer in cases of collision at sea must be measured according to the ordinary principles of the common law: *The Argentino.* (2) What I have to consider is (adopting the language of Lord Herschell C. in *The Argentino* (3)) whether if this were an action brought in a Court of common law, and tried by a jury, I, as judge, ought to direct the jury that these damages now in dispute could not be recovered, on the ground that they were too remote. The positive equivalent to "not too remote" which has been generally used is "proximate." "Proximate" is not an absolute term; in law it does not mean "nearest"; it means something like "sufficiently near for the Courts to give effect to." In law, what is remote is not proximate, and what is proximate is not too remote. No general test of proximateness or remoteness has yet been discovered, and no definition, at once precise and complete, has been given, or can be given. Various phrases have been used to describe the consequences which are not too remote, and in which a tortfeasor is liable, such as "direct and natural consequences," "natural and proximate consequences," "normal, likely, or probable consequences," "immediate and natural consequences," "natural and reasonable consequences," "the natural and probable consequences of a proximate cause," "the consequences of a primary and

(1) (1884) 9 P. D. 105, at p. 113. (2) (1888) 13 P. D. 191, at p. 200.
(3) (1889) 14 App. Cas. 519.

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substantial cause," "consequences which flow directly and in the usual course of things from the wrongful act." The easiest descriptions to apply, and perhaps the most authoritative, are those which were used in the Court of Appeal and in the House of Lords in *The Argentino*. (1) A combination of them would seem to be that "such damages as flow directly or immediately, and naturally, or in the usual or ordinary course of things from the wrongful act, are not too remote to be recoverable." In other words, they are the proximate consequences in law; but it must be remembered, to use the words of a well-known American author (Sedgwick), that "the legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time and space; it is purely practical, the reason for distinguishing between the proximate and remote causes and consequences being a purely practical one"; and, again, to use the words of an eminent English jurist (Sir F. Pollock), "In whatever form we state the rule of 'natural and probable consequences,' we must remember that it is not a logical definition, but only a guide to the exercise of common sense. The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."

Two other general observations may be made. The first is that the fundamental principle upon which the law of damages for wrongful acts is founded is that of "restitutio in integrum," subject to the qualification imposed by the decisions that the damages must not be too remote. The second is that the disposition of the Courts has been to extend rather than to narrow the range of proximate causes or natural and probable consequences: see per Sir R. Phillimore, in *The George and Richard* (2), and Sir F. Pollock on Torts, 9th ed., at p. 47.

It would seem to me that a loss or damage which is clearly the direct and immediate consequence of a wrongful act is always proximate, and that no further inquiry is really necessary. In the present case the loss of the use of the vessel for the whole period while she was in dry dock, including the period of the strike which occurred while she was there, was clearly directly and immediately due to

(1) 14 App. Cas. 519. (2) (1871) L. R. 3 A. & E. 466, at p. 476.

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the defendants' negligence which made it necessary for her to go for repair; and damages for the loss of the use of the vessel for that whole period is therefore not too remote. But if it be necessary to inquire and ascertain that the loss or damage flowed not only directly and immediately, but "directly and naturally, or in the usual or ordinary course of things," in order to make the damage recoverable, in my opinion, the loss and the damages claimed which are now in dispute did so flow in this case. There are passages in the joint judgment of Bowen L.J. and Lindley L.J. in *The Argentino* (1), and in the speech of Lord Herschell in the same case in the House of Lords (2), which appear to justify the opinions which have just been expressed, unless those passages require to be qualified or limited in regard to the special facts of that case. They are as follows: —

Per Bowen L.J. and Lindley L.J.: "A collision at sea caused by the negligence of an offending vessel is a mere tort, and we have only therefore to consider what has been in the particular case its direct and natural consequence. This consequence (in the case of an innocent ship which is disabled by an accident) is that its owner loses for a time the use which he otherwise would have had of his vessel. There is no difference in principle between such a loss and the loss which the owner of a serviceable threshing machine suffers from an injury which incapacitates the machine, or the loss which a workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to us to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves."

And per Lord Herschell: "The loss of the use of a vessel, and of the earnings which would ordinarily be derived from

(1) 13 P. D. at p. 201. (2) 14 App. Cas. 519.

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its use, during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision."

The contention for the defendants was, that the damages did not flow from the defendants' tort in the direct, natural, or usual or ordinary course of things, by reason of the strike intervening. It has often been urged that the intervention of a third person's act, or of some independent human agency, prevents the application of the rule of proximate cause, and makes the further results and damages remote; but that general proposition is clearly unsound, since as far back as *Scott* v. *Shepherd.* (1)

"Natural" (which has been paraphrased as "in the usual or ordinary course of things"), as used as a test of proximate consequences, does not mean "in the course of nature." In *The City of Lincoln* (2) Lindley L.J. said it comprised human conduct. "Reasonable human conduct" (he said) "is part of the ordinary course of things. So far as I can see my way to any definite proposition, I should say that the ordinary course of things does not exclude all human conduct, but includes at least the reasonable conduct of those who have sustained the damage and who are seeking to save further loss."

In the present case the plaintiffs who sustained the damage sought to save further loss by taking the ship as soon as they could, after temporary repairs were executed, to a proper dock for the purpose of having her permanently repaired and made fit for use. In what they did, the defendants admitted the plaintiffs acted reasonably. No evidence was given that the strike was illegal, nor even that it was unexpected. In the ordinary course of business industrial disputes may and do occur, and strikes ensue. Business men in the ordinary course assume this, and in their contracts protect themselves against the results of strikes which may occur. The company which undertook to carry out the vessel's repairs for the plaintiffs in this case did so. It was not suggested that the plaintiffs acted unreasonably in entering into such a contract; or that they could have procured a contract for the execution of the repairs within an absolute

(1) (1770) 2 W. Bl. 892; 1 Sm. L. C. 11th ed. 454.
(2) (1889) 15 P. D. 15, at p. 18.

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time, without reference to any probable or possible strike. Of course, such an independent act of a third person may be interposed as would put an end to the continuity and efficiency of the first alleged proximate cause of the damage, and be itself the active, real, and proximate cause. But the strike in this case, in my opinion, was not such an act.

A remarkable illustration of the continuance of the efficiency of a primary and proximate cause so as to retain the liability for the consequential damages as not being too remote, notwithstanding the intervention of an independent act of a third person, is to be found in the case of *De la Bere* v. *Pearson.* (1) The intervening act of a third person in that case was assumed to be even a criminal act. Lord Alverstone C.J., in a considered judgment, and in general words applicable to contract and tort alike, declared the law as follows: "I think it is unnecessary to consider in detail any of the many authorities in which the question of remoteness of damage has been discussed; and without attempting to distinguish between the expressions causa causans, causa sine qua non, and causa proxima, the rule of law appears to me to be now well established, that if the defendants' breach of contract or duty is the primary and substantial cause of the damage sustained by the plaintiff, the defendants will be responsible for the whole loss, though it may have been increased by the wrongful conduct of a third person, and although that wrongful conduct may have contributed to the loss."

If this rule be applied in the present case, it seems clear that the negligent act of the defendants, which brought about the collision and damaged the plaintiffs' vessel, necessitating her being taken to dry dock to be repaired, was the primary and substantial cause of the damage sustained by the plaintiffs through the loss of her use during the whole time she lay there, unavailable as a trading vessel. Many illustrations occur to the mind of things which might happen to prolong the period of repair, and of consequent non-use of an innocent vessel damaged in a collision at sea, where it would appear to be quite wrong to exonerate the wrong-doer and impose a pecuniary loss upon the owner of the innocent ship. Suppose, for example, that a great

(1) [1907] 1 K. B. 483.

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liner were injured in a collision in the Atlantic Ocean, and that no dock was available for her repair before she reached Southampton. She properly, and reasonably, and perhaps inevitably, makes for Southampton. Before she arrives there a strike takes place, and it is impossible for her to be docked; and there is no reasonable probability of the strike coming to an early end. There might be no other dock in this country to accommodate her. She then proceeds, say, to Hamburg, properly and reasonably in the circumstances, in order to be dry-docked there. Before she arrives, difficulties occur there, either through strikes or other causes, which render it impossible for her to enter a dry dock large enough to receive her. She then, properly and reasonably in the circumstances, returns towards Southampton in the expectation of the strike terminating at an early date, and, after, say, some days' delay, is able to enter a dry dock and to be put in train to be repaired. Could it be said that the loss of the use of the vessel in the interval by reason of the stated difficulties should fall upon the innocent owner, and that the wrong-doer responsible for the collision should escape free from all liability for such loss?

Take one other instance: It is a common occurrence that ship repairers have to procure from engineering manufacturers elsewhere particular pieces of machinery which may be required for the repair of a damaged vessel. In the delivery of such machinery delay may be caused, not by the owner of the vessel, or by the repairers, but possibly by the engineers having difficulties in their works, or by default or difficulties of a railway company. During such delay the owner of the damaged vessel loses her use. Again, surely, the wrong-doer who injured her ought to make good this loss.

In my judgment it would be just upon general principles, and also in accordance with the true principle deducible from the authorities, to hold, in cases where a vessel is injured in a collision at sea by the negligence of another vessel, that where it is reasonable to take the damaged vessel to a dock to be repaired, and where the owner of the innocent vessel acts in a reasonable and businesslike way in all matters connected with the docking and repairing of the vessel up to the time of the vessel being delivered

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to him in a state of repair, the owner of the vessel at fault—i.e., the wrong-doer who commits the tort—is liable at law to make good any loss which the owner of the injured ship can shew he suffered by being deprived of the use of his ship during the whole period when she was unavailable for use through being under repair. Upon the facts of the present case, I am of opinion that I could not, as judge, direct a jury that the damages suffered by the plaintiffs by the detention of their vessel during the strike period were too remote. Upon a proper direction as to remoteness, any jury could find, and rightly find, that the loss of the use of the vessel during that period flowed directly, naturally, and in the usual or ordinary course of things from the defendants' negligence in running into the plaintiffs' vessel, and making it necessary to dry-dock and repair her. In so far as I am exercising the functions appropriate to a jury, that is my finding.

The result arrived at by the learned registrar was right, and, therefore, his report is confirmed. The defendants' appeal is accordingly dismissed with costs.

Solicitors for plaintiffs, the owners of the *Don Benito*: *Pritchard & Sons.*

Solicitors for defendant petitioners, Captain Sinclair and Lieutenant Scott: *The Treasury Solicitor.*

T. L. M.

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Nov. 1, 3, 19.

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[1913 C. 2244.]

Admiralty—Collision—Single Foreign Ship and Squadron of Warships—Crossing Rule—Board of Trade Notice to Mariners, 1897—*Regulations for Preventing Collisions at Sea, arts.* 19, 21, 27.

Those in charge of a Spanish merchant vessel proceeding up the North Sea, in fine clear weather, at about seven knots on a course of N. 21° W., observed a squadron of warships about a mile distant drawing up on the port quarter on a more easterly course and at greater speed. The Spanish vessel kept her course and speed, under art. 21 of the international regulations for preventing collisions at sea, and the nearest war vessel passed safely across her bows; but, in spite of an effort by the Spanish vessel at the last moment to avoid collision, the second warship of the squadron struck the Spaniard a heavy blow and sank her. The owners of the Spanish vessel charged the defendant, the navigating officer of the second warship, with (inter alia) failing to keep out of the way under the King's Regulations equivalent to art. 19 of the international regulations, whilst the defendant mainly relied on the Spaniard's non-compliance with the rule of good seamanship embodied in the notice issued by the Board of Trade in 1897, by which those in charge of single ships are warned not to approach a squadron of warships so closely as to involve risk of collision:—

Held by the President (Sir Samuel Evans), that the defendant was alone to blame, as he knew that the plaintiffs' vessel was foreign, and that the King's Regulations equivalent to art. 19 applied, whilst those in charge of the Spanish vessel did not know, and could not be taken to know, of the Board of Trade notice to mariners. They, therefore, were justified in keeping their course and speed under art. 21 of the international rules.

Action of Damage by Collision.

The plaintiffs were the Compania Naviera Vascongada, owners of the late steamship *Umbe*, and her master and crew suing for their lost effects.

The defendant was Douglas George Jeffrey, at the material time navigating officer in charge of H.M.S. *King Alfred*.

On July 31, 1913, about 8 A.M., the weather being fine and clear, the wind east-north-easterly light, and the tide setting to the northward at a force of from one to two knots, the Spanish screw steamship *Umbe*, of 2210 tons gross, engines of 190 horse power nominal, and manned by a crew of twenty-five hands, was

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proceeding up the North Sea to the northward and eastward of the Spurn light vessel, in the course of a voyage from Bilbao to Middlesbrough with a cargo of iron ore, steering N. 21° W. magnetic, and making about 7½ knots. In these circumstances those in charge noticed several war vessels steaming together and drawing up on the port quarter of the *Umbe*. The second of these proved to be H.M.S. *King Alfred*, a twin screw cruiser, in charge of the defendant, the navigating lieutenant on the bridge. The warships were steering N. 27° E. magnetic, they were making about ten knots, and the nearest was then distant about a mile, and they were bearing about three points abaft the port beam of the *Umbe*, which vessel kept her course and speed. The subsequent manœuvres of the vessels are fully detailed in the judgment; but, shortly stated, the leading vessel of the squadron safely crossed the bows of the *Umbe*; but the *King Alfred* apparently took no steps to keep out of the way of the Spanish vessel, and drew up so far on her port side that manœuvring would not enable her to pass astern, and, therefore, to avoid a collision which was becoming imminent, the engines of the *Umbe* were put full speed astern; but the *King Alfred*, with her starboard bow, struck the port bow of the *Umbe*, and, swinging to port, again struck the *Umbe* on the port side, with the result that the *Umbe* sank.

The plaintiffs charged those on board the *King Alfred* with failing to keep out of the way of the *Umbe*, improperly attempting to cross ahead of her, not easing their engines, not indicating the course of the *King Alfred* by any signal, and failing to comply (inter alia) with the provisions of arts. 19, 22, 24, 27, 28, and 29 of the regulations for preventing collisions at sea (1), as applied

(1) Art. 19: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Art. 22: "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

Art. 24: "Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel . . . ."

Art. 27. (Special circumstances rendering a departure from the rules necessary.)

Art. 28. (Sound signals.)

Art. 29. (Precautions required by the ordinary practice of seamen.)

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in identical terms by His Majesty's Regulations to His Majesty's ships.

By his defence the defendant denied that the collision was caused by his negligence, and charged those on board the *Umbe* with breaches of arts. 21 (1), 27, 28, and 29 of the regulations for preventi ng collisions at sea, and particularly with not complying with the rule of good seamanship stated in the "notice to mariners" issued by the Board of Trade in April, 1897, warning "single ships approaching squadrons" not to approach the warships so closely as to involve risk of collision or attempt to pass through or to break the line of the squadron, and to adopt timely measures to keep out of the way.

Bateson, K.C., Hugh C. S. Dumas, and *H. M. Robertson,* for the plaintiffs, the owners of the *Umbe,* and her master and crew.

Laing, K.C., and *C. Robertson Dunlop,* for the defendant, Lieutenant Jeffrey.

The arguments of counsel fully appear from the judgment. In addition to the cases therein mentioned, counsel for the defendant referred to *The Etna* (2), in respect of the Board of Trade "notice to mariners" summarized above (3).

Cur. adv. vult.

1913. Nov. 19. THE PRESIDENT (SIR SAMUEL EVANS.) The collision in this case took place a little after 8 o'clock on the last morning in July of this year, in the North Sea, above the mouth of the Humber. The colliding vessels were a Spanish steel screw steamship, the *Umbe,* and a British cruiser, H.M.S. *King Alfred.*

The *Umbe* was a vessel of 2210 tons gross register, 295 feet long, with triple expansion engines of 850 horse power indicated, and manned by a crew of twenty-five hands all told. She sank as the result of the collision, but all hands were saved. The cruiser was a powerful twin screw cruiser of 14,000 tons displacement, and

(1) Art. 21: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed . . . ."

(2) [1908] P. 269.

(3) The notice is set out at p. 275 of the report of *H.M.S. Sans Pareil* [1900] P. 267.

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500 feet in length. At the time of the collision she was in charge of the defendant, Lieutenant Jeffrey, as officer of the watch. He was a master of a merchant ship and a lieutenant of the Royal Naval Reserve, which he joined in 1912. He had served as lieutenant of the Royal Naval Reserve in the *King Alfred* for a fortnight before the accident.

The speeds of the steamship and cruiser at all material times were $7\frac{1}{2}$ and ten knots respectively. The speed of the cruiser was, however, suddenly increased by an order of full steam ahead on both engines just immediately before she struck the steamship. The pleaded courses of the two vessels were N. 21° W. (magnetic) and N. 27° E. (magnetic) respectively. It was accepted that the course of the cruiser was as pleaded, until the helm was starboarded just before the collision.

The serious contest between the parties was as to the course of the *Umbe* and the manœuvres which the defendant alleged she executed in the ten or fifteen minutes preceding the accident. The case for the *Umbe* was that her master regarded the cruiser as the vessel whose duty it was to give way, and that he accordingly kept his course of N. 21° W. and his speed, in accordance with the international rules, until he put his engines full speed astern when the collision was imminent. Apart from some extraordinary manœuvres which Lieutenant Jeffrey described, the case for the defendant was that the helm of the *Umbe* was starboarded just before the collision, when the two vessels were one cable distant, from a course practically parallel with that of the cruiser till she headed round to W.N.W., which means a turning of about eight points.

The plaintiffs' case was a simple one, and was described by the defendant's counsel as a "cast-iron case difficult to shake by cross-examination." It is therefore necessary to examine the defence carefully to see whether it is more reliable, and whether it is sufficient to dislodge or demolish the plaintiffs' case.

The cruiser was one of a small squadron of ships of the Navy, five in all. There were two other heavy cruisers, the *Good Hope* and the *Drake*, of the same class as the *King Alfred*, and two light cruisers, the *Amphion* and the *Active*, of a displacement of only 3350 tons each. At the material times the *Good Hope* was

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the leading cruiser, with the *King Alfred* and the *Drake* following in line—the distance between each being five cables—and on the starboard and port side of the *Good Hope* were the *Amphion* and the *Active*, each also five cables distant. The *Amphion* starboarded for the *Umbe*, and she and the *Good Hope* passed ahead of her.

Having regard to the defence raised that the *Umbe* was guilty of bad seamanship in keeping a course which would take her through the squadron—which is dealt with later—it is to be observed that both the defendant on the *King Alfred* and the officers in charge of the *Amphion* said expressly that they regarded their cruisers as the give-way vessels, and the *Umbe* as the crossing ship on the starboard hand, within the meaning of the international rules.

The defendant's case in its essential parts really depended upon the evidence of the defendant himself. No witness except the defendant said that he saw the *Umbe* starboarding at the last, and it was to this starboarding that he attributed the disaster. I will therefore deal with the defendant's account of the occurrences before examining the evidence of the other witnesses produced on his behalf.

The account which he wrote in his log about an hour and a half after the collision is as follows: "7.50 A.M., S.S. *Umbe* (Spanish) steering apparently parallel course outside H.M.S. *Active*. 7.55, starboarded and passed under *Active's* stern. 8 o'clock, straightened up on parallel course at about 1½ cables. 8.3.—S.S. *Umbe* swung to port. Ordered helm to starboard and full speed ahead. 8.6.—S.S. *Umbe* struck *King Alfred* on starboard side with bluff of bow and scraped fore and aft. From 8 o'clock to 8.6 no one apparently on steamer's bridge."

Lieutenant Jeffrey, in order to explain the variations between this account and his evidence, said he wrote it an hour and a half later, after returning with his boats from the *Amphion*, and "without collecting his thoughts." (The word *Active* in two places in the log was a mistake for *Amphion*.)

The next account in order is that in paragraph 3 of the defence. It was contended for the plaintiffs that this account is more like that in the log than that given in evidence; and, for the

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defendant, that it is consistent with the evidence and not with the log. If it were necessary to decide between these two contentions, I think the former is better founded.

Now, it is necessary to give a résumé of the evidence of Lieutenant Jeffrey. He went on the bridge as the officer of the watch at 7.30 o'clock. He took over the course of N. 27° E. He was to keep station astern of the *Good Hope*, at five cables. He said the *Amphion* then bore four points on his starboard bow about five cables away, and the *Umbe* five points on the starboard bow, seven to ten cables away, and heading approximately parallel with the *Amphion*. The next thing he noticed was the *Amphion* swinging to starboard, and the *Umbe* passing two or three cables off under the cruiser's stern, steering a course between W. and W.N.W. from the course of N. by E. to N.N.E., a change of eight or nine points under a starboard helm. It was the swinging to starboard of the *Amphion* that first called his attention to the *Umbe*. He did not see the *Amphion* go to port under her starboard helm, nor did he observe the manœuvres of the *Umbe* which effected the change of eight or nine points in her heading. The *Umbe* then ported back the eight or nine points and resumed her original course roughly parallel with the cruisers, and she then bore five to six points on the starboard bow, three cables away. Although quite safe in that position, the *Umbe* starboarded again, very nearly back to the W.N.W., again a turn of about eight points. Then she ported back those eight points, and straightened up bearing one point before his beam and three cables away; and finally she starboarded back again, when one cable distant, from practically a parallel course, immediately before the collision, and came round to W.N.W., about eight points. On this starboarding he (Lieutenant Jeffrey) acted at once, ordering "starboard helm 15 degrees—starboard helm 25 degrees. Full ahead both engines"; but while he said the *Umbe* made a turn of about eight points, his cruiser changed less than $4\frac{1}{2}$ points, to a heading of N.N.W. He gave no helm signal of these two starboard helm orders, although he said he had time to do so. The collision then happened, and immediately he gave the order to stop both the port and starboard engines. His own evidence, as well as the log-book, and

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the engine-room records, when the times are synchronized, shew that no action was taken by Lieutenant Jeffrey until an extremely short time before the impact. Petty Officer Hill, who was at 8 o'clock conning at the wheel, and who jumped to the helm himself when the order to starboard 15 degrees was given, also proved the same thing, establishing that it was not a matter of minutes but of seconds.

It is obvious that the defendant's story is an extraordinary one, and one which would require substantial corroboration. He, no doubt, had much to attend to as the only officer in charge, and his first attention was probably given to the cruisers which he was accompanying. He had a signalman told off to keep a look-out. His place of look-out was on the lower bridge, just below, and within speaking hail of the officer in charge. This look-out man made no report of the *Umbe*. He was not called as a witness. No explanation was given of his not being called. As has been stated, H.M.S. *Drake* followed in line of the *King Alfred*, five cables away. Her officers, or men, were in about the best place to see the positions and manœuvres of the *King Alfred* and the *Umbe* with relation to each other. No one was called from H.M.S. *Drake*. Again no explanation was offered of this circumstance. These facts tend to throw doubt upon the accuracy and reliability of Lieutenant Jeffrey's observations and story.

It remains to be seen whether the witnesses called for the defendant supported his case, or tended to discredit or weaken it. As to the all-important question of the course of the *Umbe*, Captain Edwards, the commander of the *King Alfred*, who came on deck immediately after the crash, gave the heading of the cruiser as from two to three points off her course; and given the agreed angle of the blow at about 30 degrees—or from 30 to 40—the vessels would have been pretty nearly upon their pleaded courses. Lieutenant Lyne, R.N.R., who was relieved at 7.30, as officer of the watch, by Lieutenant Jeffrey, stated that the courses were converging, and that the *Umbe* was heading somewhere in the direction of Flamborough Head, which, broadly speaking, was her course. Captain Blacklock, R.N.R., who was the officer of the watch on the *Good Hope*, stated the course of the *Umbe* about 7.55 o'clock to be N.N.W. (i.e., N. 22½° W.), which is, within

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a small fraction of a point, the course which was pleaded for the *Umbe*, and to which her witnesses deposed and adhered. He also said that from the time he saw the *Umbe* till then she had not altered her course. His evidence was that the *Amphion* altered her course for the *Umbe* under starboard helm, but he could not say how much, and that afterwards the *Umbe* altered her heading under starboard helm until the two vessels were about at right angles to each other. In my opinion, and according to the advice I have received, it is quite possible that by reason of the alteration of the *Amphion*, which starboarded to within 2½ cables of the *Good Hope*, Captain Blacklock may have thought the two vessels were about at right angles when the *Amphion* ported back to get to her station, and may easily have been mistaken when he thought the *Umbe* had changed six points to head to west or southward of west, but he distinctly said that whatever alteration the *Umbe* appeared to have made, she came back again on to her course of about N.N.W., which was her pleaded course.

Petty Officer Hill, who came on watch on the *King Alfred* at 8 o'clock, and who took the wheel himself when the defendant gave the orders to starboard at close quarters, marked the positions of the *King Alfred* and the *Umbe* at about 8 o'clock, and assuming the course of the cruiser to be N. 27° E., the course or heading of the *Umbe*, according to his marking, is N. 10° W., or within a point of the pleaded course of the *Umbe*, and 2½ points away from the course attributed to her by the defendant. Lieutenant Ryland, R.N., who was the officer of the watch on the *Amphion*, did say that he saw the *Umbe* when five points on his starboard bow heading between W. and W.N.W., and that he put his helm to starboard to cross her bows. He afterwards ordered "stop both engines" about a minute after starboarding, because he did not think he could cross her bows; but almost immediately after that his captain came on the bridge and cancelled that order and ordered fifteen knots speed ahead on both engines, and then succeeded in passing ahead of the *Umbe*. Lieutenant Ryland said he never noticed the *Umbe* on any other heading except W. or W.N.W. I think he mistook the heading. It is difficult to believe that he would order his engines to be

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stopped if the *Umbe* was heading W.N.W. and going to cross him; his stopping engines is more consistent with a heading of N.N.W. It is to be observed that he did not speak to any of the five helm movements on the *Umbe* which are comprised in the defendant's account. It must also be noted that his captain, who cancelled his orders and took the *Amphion* clear of the *Umbe*, was not called.

For these reasons, among others not detailed, I have come clearly to the opinion that the defendant did not keep a careful or accurate observation; that his account cannot be accepted; that he failed to do anything until the very last moment to keep out of the way of the *Umbe*, although he regarded himself as bound by the rules to keep clear of the *Umbe;* that he acted too late, and that when he took action it was the wrong action to increase his speed and starboard his helm; that he failed without reason to give any helm signals; and that he is to blame for the collision.

Having said this, after a careful and anxious consideration of the case, I am confirmed in my opinion that although the witnesses for the plaintiffs were, like most of the other witnesses in the case, mistaken in matters of bearing and distance and times, they were speaking the truth when they said that the course of the *Umbe* was N. 21° W. magnetic, and that they did not alter their course or speed until the engines were put full speed astern when the collision was imminent, and when it appeared that the *King Alfred* was not manœuvring for the *Umbe* and could not at that stage have avoided the collision. The statement in the defendant's log that from 8 to 8.6 o'clock there was no one, apparently, on the bridge of the *Umbe* can only be accounted for by wrong observation on the cruiser, because in fact the master, the chief officer, the second officer, and a seaman at the wheel were on the bridge during that time, and the master ordered the second officer himself to take the wheel and to keep the ship steady on her course when the warships were getting near.

A word remains to be said about the contention made for the defendant that the plaintiffs' master was negligent in keeping his course, if it meant passing through the line of the five ships of the fleet. Some reliance was placed on the notice to mariners

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issued by the Board of Trade in April, 1897, as embodying a rule of good seamanship. The plaintiffs' officers, who were Spaniards, had never heard of it. The defendant knew that the plaintiffs' vessel was a Spanish vessel. He saw her hoist the Spanish ensign as a compliment to the English cruisers.

The squadron consisted of just two lines, at right angles to each other. Each of the ships was half a nautical mile apart, and the distance between the *Amphion* and the *King Alfred* in station was nearly three-quarters of a mile. It was daylight, and the weather was quite clear. The plaintiffs' master thought he was bound by the international rule, which is the only regulation he was aware of. The defendant took the same view.

I feel a genuine regret that I can find no assistance in the opinions expressed in the House of Lords in the case of *The Hero* (1) upon the questions raised in the Courts below in that case, and dealt with in cases like *H.M.S. Sans Pareil* (2); but in the circumstances of the collision the subject-matter of the present action, I am clearly of opinion—and I am fortified in that by the advice of the Elder Brethren—that it was not bad seamanship, or negligence, on the part of those in charge of the *Umbe* to observe the international rule to keep her course and speed; and also that the exercise of ordinary care, and compliance with the same rule, which the defendant thought applicable, would, without any difficulty, have avoided and averted the accident, which resulted in the sinking of the Spanish steamship.

I therefore give judgment for the plaintiffs, and order a reference to the registrar and merchants to assess the amount of the damage sustained.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitor for defendant: *The Treasury Solicitor.*

(1) [1912] A. C. 300. (2) [1900] P. 267.

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THE APE.

[1913 F. 624.]

Admiralty—Collision—Compulsory Pilotage—Navigation in Fog—English Pilot—Foreign Crew—Interference with Pilot—Assistance from Ship's Officers.

During a fog, two steam vessels came into collision in the river Humber, and were found by Bargrave Deane J. equally to blame for (inter alia) excessive speed ; but exemption from liability was claimed by the owners of one of the vessels on the ground that she was in charge of a pilot by compulsion of law. The vessel was foreign and reports in the Swedish language of whistles were received on the bridge from the look-out forward; but were apparently unheeded by the English pilot:—

Held, that the plea of compulsory pilotage failed, for, though, in the absence of manifest incapacity, a pilot should not be interfered with, it was the duty of the ship's officers to take care that the reports received from forward were understood by the pilot, and that his attention was drawn to the fact that, in the circumstances, the speed he was maintaining on the vessel was a breach of the international regulations for preventing collisions at sea.

Action of Damage by Collision.

The plaintiffs were the owners of the steamship *Falka*, and the owners of the cargo laden on board her.

The defendants, and counter-claimants, were the owners of the steamship *Ape*, and her freight.

The case is reported on the question of the nature of the assistance to be rendered by the ship's officers to an English pilot, not acquainted with the foreign (in this case Swedish) language, but compulsorily in charge of a foreign vessel, and the amount of interference permissible.

On October 9, 1912, about 7 A.M., the weather being foggy, with no wind, and the tide ebb of the force of about two knots, a collision occurred in the river Humber, about two miles above the Bull light,—under circumstances fully detailed in the judgment—between the *Falka*, a screw steamship belonging to Malmo in Sweden, of 1704 tons net register, proceeding up the river on a voyage from Riga to Grimsby laden with timber, and the *Ape*, a screw steamship belonging to Yarmouth, of 466 tons gross

register, engines of 85 horse power nominal, manned by a crew of eleven hands, and proceeding down the river in the course of a voyage from Hull to Yarmouth with a general cargo. As a result of the collision, and to prevent their sinking in deep water, both vessels had to be beached.

The plaintiffs by their amended pleadings alleged that "if the collision and damage were caused or contributed to by any negligence on the part of the *Falka* (which is denied) such negligence was that of the pilot alone who was in charge of the vessel by compulsion of law," and the plaintiffs charged the defendants, the owners of the *Ape*, with (inter alia) navigating at too great a rate of speed in fog, and failing to keep on their starboard side of the channel; whilst the defendants charged the plaintiffs with (inter alia) failing to stop the engines of the *Falka* in due time, improper action of the helm, and navigating on the wrong side of the channel.

The facts upon which the Court came to the conclusion, on the advice of the Elder Brethren, that the pilot of the *Falka* was not properly supported in the performance of his duties by the master and crew, are fully set out in the judgment.

1914. Jan. 28, 29. *Aspinall, K.C.*, and *Lewis Noad*, for the plaintiffs, the owners of the *Falka*.

Bateson, K.C., and *D. Stephens*, for the defendants, the owners of the *Ape*.

On the question of non-interference by the master with the navigation of the vessel by the pilot in charge by compulsion of law, counsel for the plaintiffs referred to *The Tactician* (1), cited in Marsden's Collisions at Sea, 6th ed., p. 237, and on the question of the plaintiffs' vessel navigating on the wrong side of a narrow channel, counsel for the defendants referred to *The Ashton*. (2)

Jan. 30. BARGRAVE DEANE J. This is a disagreeable case, and has given the Court a great deal of anxiety. I am glad to say that we are all agreed on the questions which I thought it right to submit to the Elder Brethren.

(1) [1907] P. 244. (2) [1905] P. 21.

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A foreign ship, the *Falka*, proceeds up the Humber, and passes the Bull light, and then, according to her own account, encounters hazy and then thick weather. She proceeds on, she hears whistles ahead of her, at least two vessels pass her on her port side, and she hears one whistle on her starboard side, and she blows two short blasts to her and an order is given for the helmsman to starboard. The helmsman says he did not starboard his helm, but the other vessel, the *Ape*, came into sight, according to the *Falka* a little on her starboard bow, and that vessel ports, and the two vessels come into collision, one starboarding and the other porting.

The *Ape's* story is that she left Hull at 5.20 in the morning; that the weather was clear; that she came down the river full speed and that she did not slacken speed until very shortly—almost immediately—before the collision; that the *Falka* was on her port side and not on her starboard side; and that the *Falka* starboarded into her and that she hardly ported at all.

The odd part of the case, and the strong part of the case, in my judgment, is the evidence of the master and the helmsman of the *Ape*. They say that they saw the masthead light of the *Falka* at a distance of a mile, and that when they got close up to her they saw her port light—her red light—and that her lights were burning brightly. On the other side, the evidence from the *Falka* is that her lights were extinguished at least half an hour before the collision, and were not burning at all, and that it is an absolute invention on the part of the master and helmsman of the *Ape*—in fact, a conspiracy between them—to say that they saw these lights.

The first question that I ask myself is: were these lights burning or not? It is a question of evidence. On one side, on the part of the *Ape*, there is the sworn statement that they were burning. On the other side there is the evidence of the mate of the *Falka*, the evidence of the look-out man on the *Falka*, and the evidence of the master of the *Alice*—a vessel which passed the *Falka* on her port side shortly before the collision—that those lights were not burning. The boatswain says: "I went up on the bridge somewhere about 6 o'clock when Benner, who subsequently went on the look-out, was at the wheel, and

having got on to the bridge the mate told me to go and take the lights in, and I went and took them in, and having taken them in and put them away in the lamp-locker, I returned to the bridge and took the wheel from Benner." Benner corroborates that by saying: "I was at the wheel, I heard the order given, I saw the lights taken in, and afterwards I was relieved at the wheel by the boatswain." That is direct positive evidence of a positive fact. I have no reason to believe that that is all an invention by these four people—certainly, so far as the master of the *Alice*, the passing vessel, is concerned, there can be no conspiracy—and I have come to the conclusion—which I say at once affects the whole of my judgment—that the story told by the master and helmsman of the *Ape* is in that respect untrue. If these two men come here and tell a story which is untrue, of course it prejudices me with regard to the rest of their case. With regard to their case, there is a dispute between the *Ape* and the *Falka* as to which side these vessels were approaching each other. Was it port to port or starboard to starboard? The whole of the evidence from the *Falka* is that it was starboard to starboard, and the evidence of the two witnesses from the *Ape* is that it was port to port. Well, I am inclined to think that these vessels were very nearly end on to each other—if anything, a trifle starboard to starboard—but that does not matter much. One vessel blew a starboard helm signal and starboarded, and it was answered by a port helm signal from the other, which ported. The collision happened as a result of those two manœuvres.

It is a narrow channel, and vessels ought to keep on their starboard side of this channel in order to pass port to port. What did the *Falka* starboard for? Why did not she port? The *Falka* should not have starboarded, and the *Ape* should not have answered that starboard helm with a port helm because that is the best way to bring about a collision. Therefore both these vessels did wrong manœuvres, whichever way you look at it.

Then there is another question to be discussed. What was the weather? Again there is contradiction all round. The master of the *Ape* says: "I did not see any fog at all. There was no fog at Hull, and there was no fog going down, but only

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a little smoke when I got somewhere down in the neighbourhood of this collision, which came from the direction of Grimsby from some drifters or something going out." It is in evidence—the witness was cross-examined to it by counsel for the plaintiffs—that there had been a very heavy fog that morning at Hull, and vessels had been delayed in coming away from Hull, and that they did not get away until the fog cleared a bit, somewhere about 5.20, when they came away apparently about the same time as the *Ape*, and it was clear weather for a vessel coming in till she got a little above the Bull lightship. It was clear, according to the *Ape*, till she got down close to the place of the collision, where the only trouble was smoke. In the face of these contradictions what am I to say with regard to the evidence from the *Alice*? The master of the *Alice* says it was patchy with fog all the way down from Hull. He also says he kept on at full speed, and, when I asked him why he did so, he shrugged his shoulders. Then he says: "It got quite thick down at the place where I passed the *Falka*. I was then blowing my whistle for fog and had been blowing it for fog, and I heard the *Falka* blowing her whistle for fog."

The conclusion to which I have come about the weather is this, that it was clear weather out at sea, that it was thickish weather above the Bull lightship, and got quite thick at the place of collision. The smoke aggravated it—low-lying smoke—and it may be that the *Ape* was able to see the masts of this big steamer the *Falka*, although I do not believe she saw any lights. She did not see her hull. That being the state of the weather—thick weather and at the place of the collision very thick—"dense," I think, was the expression used by the master of the *Alice*—both vessels—the *Ape* and the *Falka*—going full speed in fog. They both heard whistles ahead of them, forward of their beam, but they continued to go at full speed, and did not obey the rule of the road to stop on hearing a fog whistle forward of the beam. Both of them did that. I cannot excuse either of these vessels for going full speed in such weather, and certainly, with regard to the *Ape*, she had no pilot on board and she must be held responsible for it.

With regard to the *Falka*, she had a compulsory pilot. He was

in charge of the ship. He it was who gave the orders, and he it was who was responsible for the navigation, unless I come to the conclusion that he was not properly supported by those on board the ship. Now, was he properly supported? This is one of the questions that we have been considering. Here is a pilot on a foreign ship. She has a foreign master, whom we have seen. I do not want to say anything unkind, but he is a rather unusual kind of master, and when in Court was anything but a bright and intelligent man. He had a foreign crew, and a chief officer who could speak a little English. The master and the chief officer were on the bridge. The master himself speaks a little English. There was a man on the look-out who could not speak English. He reported in Swedish a whistle ahead, and when in the box he was asked to say what it was he reported in Swedish. Unless the pilot speaks Swedish I am sure he could not understand what the young man was reporting, only that he did report. Both the chief officer and the master heard what was reported, and I have asked the Elder Brethren and I have asked myself what, in such a state of things, is the duty of the officers of a ship, when a report in a foreign tongue comes from forward, to which the pilot pays no attention. It is quite true that they have no right to take the vessel out of the hands of the pilot, but it is their duty to point out to him that there are international rules, that a vessel must not go full speed in fog, and that if a vessel is going full speed ahead in a fog and hears whistles forward of the beam her duty is at once to stop. The pilot says he heard no whistle, and the look-out man says that he reported a whistle. No intimation, no interpretation, was given to the pilot when the look-out man reported the whistle.

I have to the best of my ability to lay down what I think is the true principle as to the duty of the officers of a ship towards the pilot, and as I have said, unless the man is incompetent in the sense of being ill or the worse for drink, or something of that sort, which justifies force majeure, the officers of the vessel have no right to take the control of the navigation out of the hands of the pilot; but he is entitled to every assistance which can be rendered him by those on board the ship; and although they may not compel him to do what they think he

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should do or ought to do, they ought to call his attention that there is a breach of an international rule which he and they have both got to obey.

I think in this case I am justified in saying, and I do say, that the officers of this ship did not give the pilot all the assistance he was entitled to. I must not altogether excuse the pilot. He did not give his evidence to my satisfaction at all, but that is not the point when it comes to the question of responsibility. The law says that, unless the pilot is solely to blame, the ship cannot be relieved of liability. I cannot say in this case that the pilot was solely to blame. I think he was not properly supported.

In my view the *Ape* is to blame, but so also is the *Falka*, and the vessels must be held to blame, and the blame must be in equal proportion to the loss which was occasioned by their fault.

Solicitors for plaintiffs: *Stokes & Stokes, for Bramwell, Bell & Clayton, Newcastle-on-Tyne.*

Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

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Feb. 24; *March* 9.

Divorce—Husband's Petition—Adultery of Petitioner—Condonation Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Discretion of the Court—Decree Nisi.*

Where, in a petition for dissolution of marriage by a husband who had been guilty of adultery during the marriage, the adultery was fully disclosed to the Court and had also been disclosed to the wife and condoned by her, the Court (Bargrave Deane J.) exercised its discretion in favour of the husband and granted him a decree. (1)

THIS was a petition by a husband for a divorce from his wife on the ground of her adultery.

The husband at the hearing disclosed divers acts of adultery to the Court, and asked that the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857, should be exercised in his favour.

(1) See the next case.

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The petitioner, in the course of his evidence, stated that he was married at Damascus in 1894. Before that date and since the year 1888 he had been living and carrying on business in London. In 1906 he became naturalized here, and his permanent home was in England. His wife complained of living in England because she was away from her relations, and about sixteen months after the date of the marriage he took her back to Damascus. He stayed there himself a few months, and as his wife refused to return with him, she went to her mother's. In March, 1901, she came to England again and rejoined her husband at his home in London, but she again raised objections to remaining in England and was constantly urging the petitioner to let her return to Damascus, until at length he reluctantly consented, and she went back to her mother at Damascus.

The petitioner stated that in 1902 he committed adultery with a Miss Jones, who gave birth to a child in consequence. In 1905 he committed adultery with another woman, whose name he mentioned. In 1906 also he committed adultery. Later in 1906 the petitioner went to Damascus to see the Archbishop, to whom he confessed his adultery. The Archbishop saw the respondent, and in the presence of the petitioner told her of the petitioner's adultery, and persuaded her to forgive him and live with him again. She, however, stayed with the petitioner only one day, and the petitioner thereupon went again to the Archbishop and obtained from him an order for a separation [produced and a translation handed in]. This purported to decree a separation in favour of the husband, to whom the custody of the only child of the marriage (a boy) was given; and the document further declared that the wife was not entitled to alimony or to any rights in respect of the said child. Previously to this, the petitioner had been sending money to his wife for her support, but after the said decree he returned to England and sent no more money to his wife. In 1912 he received information and afterwards filed the present petition.

Evidence was adduced to the effect that the respondent was giving the life of a common prostitute at Damascus; and, formal evidence of the validity of the marriage having been given,

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Barnard, K.C. (*E. Todd* and *T. Vosper* with him), for the petitioner, asked the Court to exercise its discretion in his favour, and referred to *Woltereck* v. *Woltereck and Walters*. (1)

BARGRAVE DEANE J. I think I have never exercised my discretion in favour of a husband guilty of adultery. I have always distinguished between the weakness of women and the weakness of men in such cases. I should like to be furnished with a list of any recent cases, and I will consider the matter carefully.

Cur. adv. vult.

March 9. BARGRAVE DEANE J. This is the petition of Cæsar Abraham Habra for a divorce from his wife, Aujeni Solomon Habra, on the ground of her adultery with Khabil Habal and other persons whose names are unknown.

The petitioner and respondent were married on March 26, 1894, at Damascus, according to the rites of the Syrian Catholic Church.

The husband carried on business in Great Portland Street, London, in partnership with his brother, and he has become a naturalized British subject.

After the marriage, the petitioner and respondent came to England and they cohabited here; but the respondent expressing a desire to go back to Damascus to see her mother, the petitioner took her back there, stayed there for a little time, and then returned to this country, his wife remaining behind with her mother. Some time afterwards, the petitioner went over to Damascus in order to get his wife to return to him, and he eventually persuaded her to return, and they lived together again in this country. But again she left him here and went back to Damascus; and it now turns out that for some time she has been living an immoral life as a prostitute in Damascus. This fact is established by evidence.

The petitioner now asks for a decree; and, having himself committed adultery in 1902 and 1905, he desires that the Court should exercise its discretion in his favour, under s. 31 of the Matrimonial Causes Act, 1857.

(1) [1912] P. 201.

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In every one of these cases that comes before it, the Court has to look at all the circumstances of that particular case: there is no general principle that applies.

Every case must depend on its own facts and surroundings, and the Court is loath to exercise its discretion except in cases where it is obviously in the interests of morality and justice that it should be exercised in favour of a guilty petitioner.

In this case, the man's adultery was committed in three isolated cases, namely, in 1902, 1905, and 1906, when his wife was away from him in Damascus under the circumstances which he has stated. He has admitted these acts of adultery in Court, and he has kept back nothing from the Court: this in itself is a matter of very great importance when the Court is asked to exercise its discretion.

But this case goes a great deal further than that. He admitted his faults to his wife. He went over to Damascus, saw the Archbishop of his Church, told him all the facts, and his wife was also present and knew the whole of the facts. In the face of the facts, the parties mutually forgave each other, and came together and cohabited again. That, according to the law, is a complete condonation on either side of the fault committed by the other.

Almost immediately afterwards, the wife again separated from her husband, and the husband again saw the Archbishop, who thereupon pronounced a decree of separation in his favour, on the ground of the wife's refusal to live with her husband. What value, in law, that decree of separation may have I do not know, and it is immaterial to consider. But it does shew this, that a person in the exalted position of the Archbishop, having all the facts before him, thought that the wife was the party to blame.

Now, I ask myself whether this husband, under all the circumstances, ought to be deprived of the relief which he asks for. In my opinion, he ought not. I think this is the sort of case in which the Act of Parliament clearly intended that this Court should exercise its discretion, and it is a case in which the Court is justified in pronouncing a decree.

I accordingly pronounce a decree nisi. I do so on the ground

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of the continual and promiscuous adultery of the respondent, she having condoned her husband's adultery and then again deserted him. Although, as I have often said, such refusal of cohabitation on the part of a wife is no valid excuse for a husband committing adultery, I think that the repeated refusal of the respondent to live with the petitioner had in a great measure to do with his acts of adultery.

Solicitors: *Good, Good & Co.*

H. D. G.

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March 3, 9.

HAMPSON *v.* HAMPSON (THE KING'S PROCTOR SHEWING CAUSE).

Divorce—Wife's Petition—Decree Nisi—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Discretion—King's Proctor's Intervention—False Answers given by Petitioner at the Original Hearing, and Material Facts not disclosed—Practice laid down for Guidance in Future Cases.*

The Court (Bargrave Deane J.), exercising in special circumstances the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857, in favour of the petitioner (wife), wished it to be clearly understood that in future it would not be exercised where a petitioner was shewn to have given wilfully perjured evidence and to have withheld from the Court material facts in relation to misconduct committed by the petitioner.

THIS was the hearing on an intervention by the King's Proctor.

Ada Hampson, the petitioner, was married to Thomas Hampson, the respondent, in May, 1904, at the registrar's office, Liverpool Road, in the county of London, and they afterwards cohabited at addresses in London. There was no issue of the marriage.

In October, 1912, the wife presented a petition for dissolution of marriage on the ground of adultery and cruelty.

The petition alleged (inter alia) that in February, 1909, the respondent had been guilty of cruelty and assaults and had coerced the petitioner into leading a life of prostitution and lived upon her earnings; that from February to June, 1909, he was guilty of similar conduct towards her; that on May 24, 1909, he

attempted to murder her; and that, after she recovered from her injuries and until he was convicted and sentenced at the Middlesex Sessions on April 8, 1911, on a charge of housebreaking, he continued to coerce her into leading a life of prostitution and lived upon her earnings therefrom, and frequently illused and treated her with great cruelty.

The respondent was in Wormwood Scrubs Prison at the date of the petition; and the suit, which was undefended, was heard by the President (Sir Samuel Evans) on February 17, 1913, when a decree nisi was pronounced.

In the course of the hearing, the petitioner, in answer to questions put to her by the learned President, stated that she had been since March, 1911, and still was, leading a moral life, and had been earning her living by selling flowers.

Upon this, the Court exercised its discretion in her favour and granted her a decree, as before stated.

Subsequently the King's Proctor intervened, and on July 25, 1913, filed his plea.

The King's Proctor by his plea alleged as follows :—

1. That material facts have not been brought to the knowledge of the Court.

2. That on February 17, 1913, at the hearing of this suit, the petitioner swore falsely to the Court that since March, 1911, she had been, and that at the time of the hearing of this suit she still was, leading a moral life.

3. That since March, 1911, the petitioner has frequently committed adultery with Riley George.

4. That for about six weeks from July to September, 1911, at 1, Graveney Road, Tooting, in the county of London, the petitioner lived and cohabited and frequently committed adultery with the said Riley George.

5. That since March, 1911, the petitioner has frequently committed adultery with Dick Wymark.

6. That for about five weeks commencing in November or December, 1911, at 1, Graveney Road, Tooting, aforesaid, the petitioner lived and cohabited and frequently committed adultery with the said Dick Wymark.

7. That from about January until the middle of April, 1912,

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at 74, Denison Road, Merton, in the county of Surrey, the petitioner lived and cohabited and frequently committed adultery with the said Dick Wymark.

8. That from April 22 until about August 26, 1912, at 23, York Terrace, Cheam, in the county of Surrey, the petitioner lived and cohabited and frequently committed adultery with the said Dick Wymark.

9. That on an occasion in or about the autumn of 1912 at the Harrow Inn, Cheam, aforesaid, the petitioner committed adultery with the said Dick Wymark.

10. That for about seven weeks commencing from September, 1912, at 88, Camden Mews, Camden Road, in the county of London, the petitioner lived and cohabited and frequently committed adultery with the said Dick Wymark.

11. That from November, 1912, until about February 10, 1913, in a caravan in the yard of 84, De Burgh Road, Wimbledon, in the county of London, the petitioner lived and cohabited and frequently committed adultery with the said Dick Wymark.

12. That from about February 10, 1913, until May 11, 1913, in a caravan in the yard of the Bull Inn, High Street, Barnet, in the county of Herts, the petitioner lived and cohabited and frequently committed adultery with the said Dick Wymark.

The petitioner, by her solicitor, in answer, filed on October 13, 1913, to the King's Proctor's plea, denied each and every allegation contained in the plea and joined issue thereon.

On February 13, 1914, the petitioner's solicitor wrote the following letter to the King's Proctor :—

"Dear Sir,

"*Hampson* v. *Hampson.*

"Please treat this letter as formal notice that my client withdraws her answer in so far as the allegations as to her relations with Dick Wymark are concerned, and you may take it that these allegations are admitted. I understand that the case will not be in the list to-morrow, nor Monday, so that I am writing you in good time to stop your witnesses coming up; however, as the allegations concerning my client's alleged relations with Riley

George are concerned, my client adheres thereto and her answer in respect of these charges stands.

"Yours faithfully,

"Arthur G. Lewis."

The case came on for hearing, upon the King's Proctor's intervention, on March 2 and 3, before Bargrave Deane J., when the petitioner in her evidence, referring to the non-disclosure of the adultery she now admitted, explained that her one wish had been to keep Wymark's name "out of it," as he had been so good to her and she had never known what happiness was until she met him about two years before. She had adopted a child her husband had by another woman. She denied adultery with Riley George.

Wymark, in the witness-box, corroborated parts of the petitioner's evidence and said he was willing to marry her.

Hollis Walker, K.C., and *Victor Russell*, for the King's Proctor.
G. F. Kingham, for the petitioner.

Cur. adv. vult.

1914. March 9. BARGRAVE DEANE J. This is a remarkable case and one which has given me great anxiety.

The parties were married in May, 1904, at a registrar's office.

They apparently stated before the registrar who performed the marriage ceremony that the wife's age was nineteen: now she says it was not nineteen but sixteen.

Having married, they lived together, and from the beginning the respondent seems to have led a life of crime. He was several times convicted, and underwent sentences of eleven months, eighteen months, and twenty-two months, respectively, with hard labour, for various criminal offences committed by him during the married life.

He was guilty of numberless acts of cruelty to the petitioner, as proved before the President, and, amongst others, he violently assaulted her on one occasion and cut her arm so that she had to go into hospital for treatment.

When he came out of prison after serving the sentence of

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eighteen months' hard labour, he resumed cohabitation with his wife, and, according to her evidence given at the hearing before the President and as alleged in her petition, the respondent compelled her, under threats of violence, to go on the streets as a common prostitute, and he continued with her, she leading that life and he taking the proceeds of her immorality until he was convicted again in March, 1911.

She was left absolutely unprotected. She was asked by the President whether, since March, 1911, she had lived a perfectly moral and straight life, and her answer was that she had. She was further asked whether she was then, at the date of the hearing, living a clean life, and her answer was: "Oh, yes; I am still going out selling flowers."

The questions put to her by the President were perfectly clear and simple.

If the case simply rested on the facts disclosed and the answers given before the President, nobody would have hesitated to grant her a decree nisi, because the adultery on her part was undoubtedly and directly caused by the conduct of her husband, the respondent.

Now the King's Proctor has intervened. [His Lordship read the allegations in the King's Proctor's plea.] The petitioner filed an answer to that plea denying every one of those allegations. Having sworn before the President in February, 1913, in answer to his questions, that she had been and was living a moral life, it has now been proved, and is admitted both by her and by one of the men with whom she is charged, that she committed adultery both before and after the decree nisi. That was about the most deliberate piece of perjury on the part of the petitioner that it is possible to conceive.

Under these circumstances I am now asked to exercise my discretion in her favour.

I have already pointed out in the last case in which I have just delivered judgment (1) that every case must be judged on its own particular set of facts.

I am bound to say that every instinct tells me that I ought not to exercise my discretion in favour of this petitioner.

(1) *Habra* v. *Habra and Habal*, ante, p. 100.

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But on the other hand there is another consideration which I cannot divest myself of, and that is this woman's future. Whether it is any use for me to give her a chance I do not know, but, if I do not, I suppose no one can doubt that she will become a prostitute. If I do, and it is on the understanding that Wymark has said that he will marry her, she will have another chance.

The King's Proctor's position is a very difficult one. He has to shew cause why a decree should not be made absolute: that is on the proved or admitted facts. But, when the King's Proctor is met with lie after lie throughout the case, his position is still more difficult in relation to the question of the Court's discretion.

I should like in all these cases to ensure that the person in whose favour I exercise the discretion vested in me should actually pay the King's Proctor's costs, but this is the petition of a pauper. Although I have no power to make any order for costs against Wymark, I think the least that he can do will be to see that the costs or some part of them at least are paid, and I hope he will see that it is his duty to ensure that the taxpayers of this country shall not be called upon to pay the expense of this long inquiry.

The result of what I have said is that against every feeling I have except one I am going to let this woman have her decree, but in doing so I wish it to be clearly understood that I will not hereafter, whatever may be the effect upon the future of the parties, in any case that may come before me, give any assistance to any person who deliberately commits perjury and deceives the Court, not only by keeping back material facts, but in denying on oath the existence of such facts. If in any future case the facts should be pointed to as resembling those in the present instance, I wish it to be clearly understood that this case will not bind me, and I will take care to see in future that people who come to this Court, as petitioners, asking for the exercise of the discretion given by s. 31, shall come to the Court, as the petitioner in the last case (1) appears to have done, honestly admitting their faults at the outset.

Solicitor: for the petitioner, *A. G. Lewis; The King's Proctor.*

(1) *Habra* v. *Habra and Habal*, ante, p. 100.

H. D. G.

1914
March 9.

PASPATI *v.* PASPATI.

Divorce—Practice—Discovery of Documents—Guardian ad litem—Husband alleged to be of Unsound Mind—Suit for Nullity—Cross-Petition for Restitution—Order for Affidavit of Documents to be filed by Guardian ad litem.

The Court has power to order the guardian ad litem of a party in a matrimonial suit to file an affidavit of documents.

This was an application adjourned into Court from chambers.

The application was on behalf of Marigo Cornelius, the guardian ad litem of Peter Paspati, for an order to set aside an order of a registrar dated February 20, 1914, by which the said Peter Paspati had been ordered to make and file an affidavit of documents.

Bayford, for the guardian ad litem. The order of the registrar is against the lunatic only. A person who is of unsound mind cannot make an affidavit.

[Sir Samuel Evans, President. It may be treated as amended, so as to make it against the guardian ad litem.]

The guardian is not a party to the proceedings: r. 196 of the Divorce Rules.

The jurisdiction to grant discovery in suits for nullity or restitution is governed by the practice of the Ecclesiastical Courts: Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22. There is no reported case in the Ecclesiastical Courts where an order for discovery has been made against a guardian.

Harvey v. *Lovekin* (*otherwise Harvey*) (1) was a nullity suit in this Court, and the question of interrogatories in such a suit was discussed in the Court of Appeal.

It is not disputed that the Ecclesiastical Courts had power to grant discovery against a party in a suit, but the guardian ad litem is not a party.

Although in *Giles* v. *Giles* (2) Sir Gorell Barnes held that the Divorce Rules were not exhaustive, there are no rules which provide for discovery against a lunatic, or the guardian ad litem

(1) (1884) 10 P. D. 122 (2) [1900] P. 17.

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of a lunatic ; and there is also this difficulty in applying the Rules of the Supreme Court, that Order LXVIII., r. 1, expressly excludes proceedings for divorce or other matrimonial causes from the operation of those rules.

[SIR SAMUEL EVANS, PRESIDENT. If that is to be taken strictly, *Giles* v. *Giles* (1) cannot be right.]

But taking *Giles* v. *Giles* (1) as an authority to be dealt with, Order XXXI. of the Rules of the Supreme Court was not at first made applicable to infants or their guardians, or to lunatics, and it was not until 1893, when r. 29 was added to the Rules under Order XXXI., that it was made applicable to infant plaintiffs and defendants and their guardians, but it does not make the Order applicable to lunatics or their guardians. The question was considered quite recently in the Chancery Division by Eve J. in *Pink* v. *Sharwood*. (2) The judgment of the learned judge shews, it is submitted, that, so far as the Chancery Division or King's Bench Division is concerned, there is no power to make an order for discovery against the guardian of a person of unsound mind.

The guardian ad litem of a person of unsound mind has one duty, and one duty only, to perform, namely, to protect the interest of the person on whose behalf he or she is appointed, and with regard to discovery he or she has performed that duty when, as she has done in this case, she has obtained an order for discovery against the opposite party : *Ingram* v. *Little*. (3) [He also requested leave to adopt, as part of his argument, the language of Bray on the Principles and Practice of Discovery. (4)]

Victor Russell, for the wife. The orders for the appointment of guardian ad litem in both suits were made ex parte : the wife denies the lunacy of the husband.

In *Redfern* v. *Redfern* (5) there are important dicta by Lindley L.J. (6) and by Bowen L.J. (7) in relation to discovery in matrimonial cases.

Pink v. *Sharwood* (2) is distinguishable from the present case,

(1) [1900] P. 17.
(2) [1913] 2 Ch. 286.
(3) (1883) 11 Q. B. D. 251, per Manisty J. at pp. 254, 255.
(4) Bray on Discovery (1885), pp. 63—65.
(5) [1891] P. 139.
(6) Ibid. at pp. 143, 144.
(7) Ibid. at pp. 149, 150.

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for that was a case where an order had been made under s. 116 of the Lunacy Act, 1890. Here, no order whatever in lunacy has been made. The documents are still under the control of this Court.

Higginson v. *Hall* (1) is in the wife's favour and has never been overruled.

Sect. 100 of the Judicature Act, 1873, defines "party" as including "every person served with notice of, or attending any proceeding, although not named on the record." The guardian ad litem in the present suits has attended all the proceedings and all the documents bear her name.

This point is new and has never been considered by this Court. [He also referred to the article on Discovery in "The Laws of England."]

Bayford in reply. The opposite party is asking for discovery, and it is for him to satisfy the Court that there is jurisdiction to make such an order.

The point was not taken in *Higginson* v. *Hall* (1), for counsel there did not dispute that there must be an affidavit of documents.

In the case of a guardian or committee appointed under the Lunacy Act, the authorities having control over such person could order him to bring in a list of the documents in his possession and could then, on looking at the documents, order them to be disclosed to the other side, if that course was deemed right. If the guardian ad litem could be treated as an officer of the Court and ordered to make a list of documents, and shew it and the documents to the Court, there would be no further difficulty.

[SIR SAMUEL EVANS, PRESIDENT. I am in no sense a judge who has jurisdiction in lunacy. The Master of the Rolls and the Lords Justices alone have this jurisdiction: although I am an ex officio member of the Court of Appeal, I have not, as such, any jurisdiction in lunacy.]

[*Bayford* also referred to a case as "unreported," in which a "next friend" of an infant was condemned in costs, and said that the recollection of Mr. Barnard, K.C., one of the counsel in the case, was that an order for discovery had been made by one of the

(1) (1879) 10 Ch. D. 235.

registrars against that person in the course of that case and that no appeal had been brought from the order. (1)]

SIR SAMUEL EVANS, PRESIDENT. This is a doubtful question, and I have to decide it as one of first impression.

The Rules of the Supreme Court do not apply to the practice in matrimonial cases; therefore I cannot get any direct assistance from those Rules.

It is admitted that in accordance with the practice in the Ecclesiastical Courts discovery of documents can be ordered against one of the parties in matrimonial suits.

In the particular case now before me there are two petitions. The first is brought by the guardian ad litem of Peter Paspati, who is said to be a person of unsound mind, not so found by inquisition: the relief asked for on his behalf is a decree of nullity of marriage on the ground that he was, at the date of the ceremony of marriage, and prior thereto, a person of unsound mind, and therefore incapable of entering into a valid contract of marriage.

The order for the appointment of a guardian ad litem was obtained ex parte.

The second is presented by Alma Olava Paspati, the wife, praying for a decree of restitution of conjugal rights, and in that petition the guardian ad litem was made respondent, or at any rate was put in the position of a person who was guardian ad litem of the respondent, and therefore would have to defend on behalf of the person said to be of unsound mind.

I do not think it right to make an order as was done by the registrar against Peter Paspati. It is obviously no use to make an order against a person who is said to be of unsound mind. Whether he is of unsound mind or not is one of the main points to be dealt with and decided in these proceedings, and nothing ought to be done now to prejudice the decision of that matter in any degree, therefore I must address myself to the question of discovery against the guardian ad litem of Peter Paspati.

(1) The case referred to was *Vivian* v. *Kennelly and Others*, and it is reported (1890) 63 L. T. Rep. 778 as to costs only, nothing having transpired and no point having been raised in Court as to discovery of documents.

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The rule which deals with these matters is r. 196 of the Additional Rules and Regulations, 1875, made under the provisions of the Matrimonial Causes Acts and of the Judicature Act, 1873.

The first part of that rule deals with the case of a committee of a person found by inquisition to be of unsound mind; the second part deals with a case where no committee has been appointed, and provides for the appointment of a guardian ad litem. The question I have to decide is whether or not the person assigned as guardian ad litem of Peter Paspati can be ordered to make discovery of documents.

In the Chancery Division there have been conflicting decisions, namely, *Higginson* v. *Hall* (1), decided by Malins V.-C., and *Dyke* v. *Stephens* (2), decided by Pearson J.; and there is a recent decision of Eve J. in *Pink* v. *Sharwood* (3), in which he chose to follow the later of those two decisions in preference to the former.

In 1893, the Rule Committee under the Judicature Acts passed r. 29 as an addition to the other rules and orders of Order xxxi., making Order xxxi. apply "to infant plaintiffs and defendants and to their next friends and guardians ad litem." It had been pointed out in cases before r. 29 was added, that the guardian of an infant was appointed to protect the interests of the infant; nevertheless the Rule Committee changed all that by the addition of this rule, which applies to infants whether suing or defending, and, if that is right in principle, I cannot see why it should not apply to persons of unsound mind not so found.

It looks rather as if the Rule Committee regarded the decision of Malins V.-C. as the right one, and, that being so, they did not think it necessary to make any rule in regard to such persons.

It seems to me right, whether there is authority for it or not, that a person who prosecutes a suit for nullity of marriage in this Division on behalf of a party alleged to be of unsound mind should be under the obligation to disclose all the documents in the possession of that person which have come into his or her possession as guardian ad litem representing the party said to be of unsound mind.

(1) 10 Ch. D. 235. (2) (1885) 30 Ch. D. 189.
(3) [1913] 2 Ch. 286.

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I have before me a list of documents in the possession of the guardian ad litem in this case. I think, according to the ordinary principles of our method of carrying on litigation, the guardian ad litem ought to disclose those documents, just as if the person for whom he is now acting were of sound mind and were a party against whom an order ought to be made.

I may add that I am not sure that, under r. 196 before referred to, the committee or guardian ad litem cannot be regarded as a party to the proceedings (see *Ingram* v. *Little* (1)).

I think on a fair construction of r. 196 it may very well be that the committee or guardian ad litem of a person of unsound mind is in every respect, for the purposes of the litigation, a party to the proceedings, and, if so, on that ground also, discovery ought to be given. I therefore order this guardian ad litem to give discovery by Friday at 12 o'clock noon.

Solicitors for the husband and his guardian ad litem: *Field, Roscoe & Co., for Bellringer, Cunliffe & Wilson, Liverpool.*

Solicitors for the wife: *Charles Russell & Co., for Kelly & Picton, Liverpool.*

(1) 11 Q. B. D. 251.

NOTE.—The case was tried before Sir Samuel Evans, President, and a special jury, and lasted five days (March 23—27). The documents disclosed pursuant to the order for discovery formed an important part of the evidence. In the result, a verdict was given for the wife; and the Court dismissed the husband's petition with costs; and made a decree for restitution of conjugal rights, on the wife's petition, with costs.

H. D. G.

1913
July 28;
1914
March 10.

PALMER *v.* PALMER AND STOCKLEY.

Divorce—Practice — Wife's Costs—Amount secured — Limit — Duration of Hearing or Trial — Application for Further Security—Full Costs—Discretion of Judge.

At the trial of a husband's petition for divorce it appeared that a sum, estimated by one of the registrars, had been secured to meet the wife's costs of the hearing. Application was made at the end of the first day that further security should be given, in view of the hearing lasting more than one day. This application was acceded to by the presiding judge.

At the conclusion of the case, which resulted in the husband's favour, the "usual order" for wife's costs was made; and the wife's solicitors thereupon carried in a full party and party bill of costs and proceeded to taxation. Objection was then taken by the husband's solicitor to all items down to the adjournment of the Court at the end of the first day of the hearing, including all items subsequent thereto and which would form part of the costs had the hearing terminated on the first day, in so far as the total allowed in respect of these items exceeded the amount actually secured before the hearing:—

Held, that the objection could not be sustained and that the registrar was right in taxing the bill as between party and party, in accordance with the principle laid down by the Court of Appeal in *Robertson* v. *Robertson* (1881) 6 P. D. 119.

There was, however, nothing in that case or in the present decision which was to be taken as limiting in any degree the discretion as to costs vested in and exercisable by the judge presiding at the hearing or trial of a matrimonial suit, by statute, and by the Divorce Rules.

SUMMONS adjourned into Court.

In this case, upon the husband's petition, a decree nisi for dissolution of marriage was pronounced on January 24, 1913, after a hearing lasting four days.

By an order dated July 1, 1912, the petitioner was ordered to pay to Elizabeth Chancellor Palmer, the respondent, or to Messrs. Church, Rendell, Bird & Co., her solicitors, the sum of 15*l.* 16*s.* 4*d.*, being the amount of the respondent's costs as taxed by one of the registrars; and it was further ordered that the petitioner should lodge in Court the sum of 60*l.*, estimated by one of the registrars as sufficient to cover the costs and expenses of the respondent of and incidental to the hearing or trial of the cause, or give a bond under his hand and seal and of two

sufficient sureties in the penal sum of 120*l.* conditioned for payment of such expenses of the respondent as should be certified to be due and payable by the petitioner not exceeding the said sum of 60*l.*, with forty-eight hours' notice of such sureties to the solicitors for the respondent.

Application for further security was made after the case was found to have lasted more than one day, and this application was acceded to by Bucknill J., before whom the case was in course of hearing.

Upon the decree being pronounced, the learned judge, on the application of counsel for the respondent (wife), made the "usual order" for her costs, such order being appended to the decree in these terms: "And it is further ordered that the petitioner do pay to the respondent her taxed costs not to exceed the amount ordered to be paid into Court or secured for the wife's costs of hearing, together with such further sum as would have been ordered to be paid into Court or secured had the duration of the hearing been known at the date of such order. And it is further ordered that the petitioner do pay to the respondent, during their joint lives and dum sola et casta, the sum of 15*s.* per week."

As to the payment of the allowance, there was to be liberty to apply, though, through inadvertence, this did not appear on the face of the decree nisi.

The solicitors for the wife carried in their bill, which was taxed at 228*l.* 13*s.* 10*d.*, but without prejudice to the petitioner's application, of which notice was given, to review the taxation.

On April 19, 1913, the petitioner's objections were lodged, and these, with the taxing registrar's observations thereon, came before the President (Sir Samuel Evans) in chambers on June 21, 1913, when his Lordship decided against the petitioner's objections to certain items relating to the expenses of two doctors, but came to the conclusion that the question raised by the first and main objection was of such general importance that it should be adjourned into Court for further argument.

The items objected to under this heading were "all items allowed down to the adjournment of the Court at the end of the first day of the hearing, including all items subsequent thereto

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and which would form part of the costs had the duration of the hearing terminated on the first day, in so far as the total allowed in respect of these items exceeds 60*l.*"

The grounds of objection were stated thus: "The objection is based upon the terms of the order, made by the judge at the hearing, under which this taxation is proceeding and by the terms of which both parties to the taxation are bound. It is submitted that the question is one simply of construction of the said order, and that by the terms of the said order the sum of 60*l.* (fixed as the amount for which the petitioner had to give security for the respondent's costs by the order of the registrar dated July 1, 1912) fixes the maximum which the respondent is entitled to recover from the petitioner in respect of all items of costs incurred down to the rising of the Court at the end of the first day of the hearing and the subsequent items as described in the first column thereof. It is submitted that it is alike irrelevant to this question of construction whether orders differing in their terms from the said order may or may not have been made in other cases or whether or not it should be thought that the said order might or should have been made in terms different from its terms in any respect. It is submitted that the terms of the said order are not susceptible of any meaning different from the meaning now contended for. But, whether this is so or not, it is submitted that the meaning now contended for is the meaning of the said order according to the true construction thereof."

The observations of the taxing registrar (who, it may be remarked, happened to be the same who made the original order for costs dated July 1, 1912) were in these terms:—

"The case lasted four days. Had it been known that the hearing would take so long, the order for security would probably have been in excess of 60*l.* Under the circumstances, it was right to tax the whole bill."

The arguments were subsequently heard in Court and judgment was reserved.

Ralph Bankes, K.C., and *J. B. Matthews*, for the petitioner.
Barnard, K.C., and *Le Bas*, for the respondent.

1914. March 10. SIR SAMUEL EVANS, PRESIDENT. In this case, the wife had obtained in the usual course an order for a certain sum of costs to be paid up to the setting-down of the cause, and an order for another sum to be paid into Court or secured for the costs of the hearing or trial.

The trial lasted more than one day. At the end of the first day an application was made on the wife's behalf that further security should be allowed, in accordance with the usual practice in such cases.

The application was acceded to by the learned judge (Bucknill J.); and, similarly, in regard to the subsequent days.

The learned judge was not asked to make any special order as to the costs of the wife at the conclusion of the trial, although a verdict was found against the wife that she had been guilty of adultery.

The order as to costs which was drawn up as part of the decree was in the form which has been adopted for some years in cases like the present, and it runs as follows: ". . . . And it is further ordered that the petitioner do pay to the respondent her taxed costs not to exceed the amount ordered to be paid into Court or secured for the wife's costs of hearing together with such further sum as would have been ordered to be paid into Court or secured had the duration of the hearing been known at the date of such order."

Upon the taxation, a larger sum was allowed for the wife's costs of preparing for trial and of the first day's hearing than the sum which had been fixed by the registrar and ordered to be paid into Court or secured before the trial. In fact, by the taxation, the taxing registrar gave the wife her costs as taxed between party and party.

The petitioner thereupon appealed, and contended that no further sum should have been allowed up to the beginning of the second day than had been theretofore fixed and secured, and that the taxing registrar ought only to have allowed the costs incurred on the second and subsequent days in addition to the sum already secured. The contention amounted to this, that the costs previously ordered to be paid or secured up to the end

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of the first day of the hearing, according to an estimate formed before the actual costs could be ascertained, should be limited and confined as it were in a watertight compartment, and from the end of the first day the further costs should be taxed without any reference to the estimate made for the costs up to the end of the first day of the trial.

As it was said that the contention involved an important question of practice, I postponed my decision in order to consult the registrars of this Court as to the practice which has been adopted.

I have now done so.

The effect of the case of *Robertson* v. *Robertson* (1) in the Court of Appeal and of the strong and adverse criticism upon it by Sir James Hannen in *Smith* v. *Smith, Major and Others* (2) seems to have been to unsettle, rather than to settle, the practice.

The report which the registrars have made to me is as follows: "Formerly, application for increased security was made at the end of each day's hearing and a further sum was fixed by the taxing registrar if possible or by the registrar in Court. Subsequently, in consequence of some observations made in the Court of Appeal in the judgments in *Robertson* v. *Robertson* (1), it became the practice in the Court, after an application for increased security, instead of making the usual order as to wife's costs, to direct a taxation of her costs and to adjourn the application as to her costs into chambers after the amount of the taxed bill had been ascertained.

"This invariably resulted in the wife being allowed the whole amount of the taxed bill and entailed a great number of applications to the judge.

"In November, 1908, Lord Gorell directed that the usual order for wife's costs, after an application for increased security had been made and granted, should be in the following form:—'And it is further ordered that the petitioner do pay to the respondent her taxed costs not to exceed the amount ordered to be paid into Court or secured for the wife's costs of hearing, together with such further sum as, in the opinion of the taxing registrar, would have

(1) 6 P. D. 119. (2) (1882) 7 P. D. 84.

been allowed if the duration of the trial had been known at the time of such previous order.'

"This form was settled by Lord Gorell in *Harrison* v. *Harrison and Mears* (November, 1908; not reported), and is the form of order which has since been in use in such cases."

The taxation in this case proceeded upon this footing, and was in accordance with the practice.

I cannot say that the taxing registrar proceeded upon a wrong principle: indeed, the taxation was in strict accordance with the decision in *Robertson* v. *Robertson* (1), and there is no reason for interfering with it. The petitioner's appeal, therefore, fails.

But I desire it to be distinctly understood that nothing that I have said in this case affects in any degree the discretion as to costs which has always been vested in, and exercisable by, this Court since its institution; formerly under s. 51 of the Matrimonial Causes Act, 1857, up to its repeal by the Statute Law Revision Act, 1892 (2); and since under the Judicature Acts; or particularly under r. 159 of the Divorce Rules.

Where at the hearing or trial the presiding judge is asked to make a special order as to costs, and makes the order in the judicial exercise of his discretion, such an order is final, and is not subject to appeal: see *Butler* v. *Butler* (3), where Lindley L.J. says: ". . . . where an Act says that costs shall be in the discretion of a judge, it is not competent to any judge to lay down a rule which shall fetter other judges in the exercise of their discretion."

In many cases which have been decided by my predecessors and myself, such special orders have been made at the hearing, either on application or on the Court's own motion; and cases frequently occur where in justice to the husband such special orders ought to be made. But in the case in which the present appeal against the taxation is brought, although the wife was found guilty of adultery, the learned judge gave to the wife the usual costs; which means that the costs are not to be limited as to any part thereof to a previous estimate, but are to be such

(1) 6 P. D. 119. (2) 55 & 56 Vict. c. 19.
(3) (1890) 15 P. D. 126, at p. 130.

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costs as are ascertained on taxation to be the proper costs to allow in a strict taxation as between party and party.

The wife is to have the costs of this appeal.

Leave to appeal refused.

Solicitors for petitioner: *Ford & Ford, for A. A. Maund, Worcester.*

Solicitors for respondent: *Church, Rendell, Bird & Co., for Samuel Southall, Worcester.*

H. D. G.

C. A.

1914

Feb. 27.

[IN THE COURT OF APPEAL.]

GILROY *v.* GILROY (HARRIS INTERVENING).

Divorce—Wife's Petition—Decree Nisi—Intervention by Stranger—Order for Trial of Issue as to Wife's Adultery—Liability of Intervener to give Security for Wife's Costs—Jurisdiction—Divorce and Matrimonial Causes Act, 1860 (23 *&* 24 *Vict. c.* 144), *s.* 7—*Matrimonial Causes Act,* 1878 (41 *&* 42 *Vict. c.* 19), *s.* 2.

A husband's petition for divorce was met by a cross-petition for divorce by the wife. The husband's petition being unsupported by evidence was dismissed, but a decree nisi was granted to the wife upon her petition. Before the decree was made absolute, upon the intervention of a stranger, an order was made for trial of an issue as to the wife's adultery, no terms as to costs being asked for or imposed upon the intervener. Upon a subsequent application by the wife that the intervener should give security for her costs of the intervention:—

Held, reversing the decision of the President, that there was no jurisdiction to make such an order.

APPEAL from a decision of the President.

In January, 1911, J. R. Gilroy presented a petition for divorce against his wife. In December, 1911, the wife presented a cross-petition for divorce against her husband. At the hearing, on February 17, 1913, no evidence was adduced in support of the husband's petition and it was dismissed; and a decree nisi was granted in favour of the wife. In July, 1913, evidence was laid before the King's Proctor implying impropriety on the part of the wife, but the King's Proctor declined to intervene. On August 27, 1913, one F. J. Harris intervened in the suit to shew

cause why the decree nisi should not be made absolute, and on November 24, 1913, Bargrave Deane J. directed an issue to be tried as to whether the wife had committed adultery. On December 9, 1913, the wife took out a summons asking that the intervener might be ordered to give security for her costs of the intervention. The registrar having refused to make the order, the wife appealed, and the President ordered the intervener to give security. From this order the intervener appealed.

Hume Williams, K.C., and *R. F. Bayford*, for the appellant. In ordering the appellant to give security for the wife's costs the learned President has wrongly applied to the intervener the rule of the Divorce Court with reference to the case of a husband. That that rule does not apply to the case of an intervener is plain when the reasons for the rule are considered.

The reason why a husband was required to give security for his wife's costs was that formerly the wife could have no property of her own, everything belonged to the husband: *Wilson* v. *Wilson* (1); *Davis* v. *Davis*. (2)

The history of the practice under which a husband was held liable for his wife's costs of obtaining a decree for divorce against him is traced in *Ottaway* v. *Hamilton*. (3) The reason was that the proceedings for divorce were treated as necessary for the protection of the wife, and therefore she had authority to pledge her husband's credit for the expenses of those proceedings. Down to 1860 no power of intervention existed except by a person who could shew that he had an interest in the suit.

By the Matrimonial Causes Act, 1860, s. 7, it was enacted that there might be intervention by a private individual or by the Queen's Proctor.

In *Dering* v. *Dering* (4) the question was raised, but not decided, whether the Court had power to condemn an unsuccessful intervener in the costs of his intervention; and in *Vivian* v. *Vivian* (5) it was held that the Court had no such power. The doubt (if any) was set at rest by the Matrimonial Causes Act, 1878

(1) (1797) 2 Hagg. Cons. 203.
(2) (1789) 2 Hagg. Cons. 204, n.
(3) (1878) 3 C. P. D. 393.
(4) (1868) L. R. 1 P. & M. 531.
(5) (1870) L. R. 2 P. & M. 100.

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(41 & 42 Vict. c. 19), s. 2, which placed the costs of the Queen's Proctor or other person intervening in the discretion of the Court.

There was, however, nothing in that Act to give the Court power to order the Queen's Proctor or the intervener to pay the wife's costs in any event. At any rate the wife cannot rightly be held to be the agent of the intervener to pledge his credit for her costs.

In *Hepworth* v. *Hepworth* (1) it was held that s. 32 of the Matrimonial Causes Act, 1857, gave the Court in a suit for dissolution power to make such order as to the wife's costs as it could have made under s. 22 in a suit for judicial separation. See also *In re Wingfield* v. *Blew* (2) and *Sheppard* v. *Sheppard*. (3)

[PHILLIMORE L.J. referred to *Wells* v. *Cottam*. (4)]

Howarth v. *Howarth* (5) may be relied upon for the respondent, but the order in that case was made upon a motion to reject the intervention. Terms were imposed in that case as the price of allowing the intervention to proceed.

Harvey Murphy, for the respondent. Under the Matrimonial Causes Act, 1860, s. 7, the power of intervention was given, and by the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 2, discretion is given to the Court as to costs in all matters. The intervener can have no interest in this matter, and the learned President has rightly exercised his discretion by ordering him to give security for the costs incurred by the wife in meeting an unfounded charge. The Court properly does not favour intervention by strangers. The case is very different where the intervention is by the King's Proctor. Here he declined to intervene.

Feb. 27. COZENS-HARDY M.R. We will not trouble you, Mr. Williams. This is an appeal from an order made by the President under circumstances which are to some extent unusual. The action was commenced by the husband against the wife, and was met by a cross-action by the wife against the husband. That litigation

(1) (1861) 31 L. J. (P. M. & A.) 18.
(2) [1904] 2 Ch. 665.
(3) [1905] P. 185.
(4) (1863) 3 Sw. & Tr. 364.
(5) (1884) 9 P. D. 218.

was commenced, I think, in 1911. Both action and cross-action came on for trial in February, 1913. No evidence was given in support of the husband's petition against the wife, but on the wife's petition, on evidence which satisfied the Court, a decree nisi was given in favour of the wife. The decree nisi was nearly on the point of being made absolute when Mr. Harris intervened, and he asked that the decree nisi should not be made absolute or to have a trial of the issue whether the wife had been guilty of adultery or not. The wife denied the adultery, and Bargrave Deane J., on November 24, made an order for the trial of the issue raised by Mr. Harris and pleaded to by the wife. No terms were imposed upon the intervener upon that occasion; it was not suggested that there was any collusion or that there were any other circumstances short of collusion. There was no suggestion of that kind; there were no terms asked for or imposed by the Court upon that issue going to trial; but afterwards an application was made by the wife that the intervener Harris should give security for her costs, not on any evidence of want of means of Mr. Harris, nothing of the kind, but in accordance with the settled practice of the Court as between husband and wife. The registrar did not think fit to make the order. The matter then came before the President, who ordered the intervener to give security for the costs of the wife in connection with his intervention, the amount of such security to be fixed by the registrar. The learned President evidently thought it was a matter that ought to be further considered, for he gave leave to appeal and it now comes before us on the question of jurisdiction.

Now as to the foundation of the settled practice of the Court under which the husband is bound to provide or give security for the costs of the wife without reference to the result of the litigation, whether the wife is or is not to blame, I think the authorities to which our attention has been called are plain and satisfactory. The practice originated at the time when the wife, in the view of the common law, could have no property of her own, and apparently it was the view of the judges who had to deal with matrimonial causes that it was not right that the wife should be called upon to defend, it might be, a petition of a kind which could alone then be granted by that Court at a time when she

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had not and could not have a penny of her own to defend herself with. They, therefore, held that security must be given, or, as was then very common, that the husband should be bound to pay, it might be even from day to day, the proctor who could come in and say: "There is so much due to me to-day in respect of this litigation, pay me this amount." Under those circumstances the Court said: "That is rather a tedious process; we will not require you to pay from day to day or from week to week what is required, but you shall give security beforehand for an amount which the registrar or a similar official may think necessary." The amount was not fixed once for all; it might be fixed from time to time as the progress of the litigation made it clear that the original amount had been spent or would not be sufficient. Then it was suggested that that doctrine had no application at all to the new proceedings in the Divorce Court under which a decree for dissolution of marriage was asked for. That was finally settled by *Ottaway* v. *Hamilton* (1) in the Court of Common Pleas, and it was pointed out there that the cases proceeded upon the implied authority of the wife to pledge her husband's credit for necessaries, and, therefore, it was held in a common law action that the wife's solicitors should recover against the husband the difference between party and party costs and solicitor and client costs to which she had been put.

The case has been argued by Mr. Murphy on the other side, who said, I think, all that could be said upon the matter. He does not attempt to say that the intervener is, quoad the wife, in the same position as the husband is to her; he does not, and could not possibly, say that the wife is the agent of the intervener or entitled to pledge the credit of the intervener; that, of course, would be quite absurd; but he relies upon s. 7 of the Act of 1860 and s. 2 of the Act of 1878 as providing that the Court may either by a special or by a general order make those terms. Nothing, I hope, has fallen, or, I think, will fall, from me to suggest that the Court may not, in proper circumstances, impose terms upon an intervener when an application is made to set aside the order for intervention. That has not been done here. This is not an appeal against Bargrave Deane J.'s order;

(1) 3 C. P. D. 393.

it is a proceeding after the intervention has been ordered and no terms have been imposed. Then it is argued that, although this is really litigation between parties standing in no relation to each other involving a pecuniary obligation, it is an exception to all other kinds of litigation, and the Court ought to say to the intervener: "Not only shall you be liable for the costs of the trial of the issue, but beforehand, whatever the result of the issue, or if the issue never comes to trial, you must give security in the same form and to the same extent as would have been the case if the husband himself had been the party." In my opinion there is no justification, arising out of those two sections, for any such order. Although Mr. Harris as the intervenant may be ordered to pay costs at the trial of the issue, I can find no justification whatever for saying that at this stage of the action he is liable to an order against him different from that which would be made against any other litigant in any other action except in the peculiar case of husband and wife. At the trial of the action the Court will, I have no doubt, do what is just, but I think it would be of the worst example if an order of this kind were made. I think that the learned judge had no jurisdiction to make the order and that the present appeal should be allowed.

BUCKLEY L.J. In the Divorce Court there exists in respect of costs as between husband and wife a state of things which in any other Court would be anomalous, that is to say, that in a litigation in which husband and wife are opposing parties the husband is compellable to pay or to provide for the wife's costs in the current litigation; it is a rule of practice which is based on the state of things which existed when a married woman had no property of her own and it was thought that she ought not to be left defenceless in litigation instituted against her by her husband; that by reason of the relationship between them, she had a right to ask that he should provide her with the means of carrying on the litigation. In the present case a similar application is made where a stranger, Mr. Harris in this case, has intervened after a decree nisi, before the decree absolute, and it is said that there is jurisdiction to order him to provide or to give security for the

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Buckley L.J

wife's costs. That, of course, cannot be based upon the doctrine on which the practice as between husband and wife was based, because the intervener owes the wife no duty in the matter; I do not think there exists any ground upon which to rest that contention, unless it be found in s. 2 of the Act of 1878. When that section is looked at it appears to me quite plain that it does not authorize the order at all. It is a section in which, the Act of 1860 having introduced intervention, it is provided that where a person intervenes the Court may make such order as to the costs of the person who intervenes and of all other persons or parties thereto occasioned by such intervention as may seem just. The wife being a party to the intervention there is, no doubt, jurisdiction to make such order as to her costs occasioned by the intervention as may seem just, but that means that if as the result of the intervention it is found upon determining the matter in litigation between those parties that one party ought to pay the costs of the other, such an order shall be made. That section does not shew that one party to the litigation may be called upon to provide or to give security for the costs of the other. I do not think that the case is within s. 2 of the Act of 1878 at all. I see no other ground on which it can be said that there was jurisdiction to make the order appealed from, and I am of opinion that such an order cannot properly be made.

PHILLIMORE L.J. I am of the same opinion, and the other members of the Court have expressed so exactly my view that I have very little to add. I will, however, contribute this to the judgment, that the reasons for the practice of the Divorce Court whereby the husband is ordered to find security for his wife's costs, whether the wife is right or wrong, whether she wins or loses, are very well expressed in the case of *Ellaytt* v. *Ellaytt* (1); and that the case of *Wells* v. *Cottam* (2) shews that in the view of the judge this practice that a wife's costs should be secured to her applies only when she is suing the husband or being sued by the husband. In that case the father of an infant quasi de facto husband sought a decree of nullity. He complicated his position by originally describing himself as appearing on behalf

(1) (1864) 3 Sw. & Tr. 503, at p. 508. (2) 3 Sw. & Tr. 364, at p. 368.

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Phillimore L.J.

of the infant as his guardian. He was allowed to rectify that, and having rectified that appeared merely as the natural and lawful father and having an interest in the matter. The wife thereupon moved for security for her costs. The Judge Ordinary rejected the application, pointing out that the rule only applied as between husband and wife for the reason which has been given, that it is one of the primary necessaries of the wife that she should be able to defend herself against the gravest matrimonial charges which can be made against her.

Appeal allowed.

Solicitors: *Faithfull & Owen; Charles Russell & Co.*

G. A. S.

1914
March 20.

IN THE ESTATE OF DAVID NATHANIEL OSMENT. CHILD AND JARVIS *v.* OSMENT AND OTHERS.

[1913 C. 1703.]

Probate—Practice—Costs—Conduct leading to Investigation—Order r. LXV., 14D *—Power of Court—Costs of all Parties ordered to come out of Legacies of Successful Parties.*

The principle of law is well established that if a person who takes a benefit under a testamentary document has been instrumental in obtaining the preparation or execution of the document, this is a circumstance that ought generally to excite the suspicion of the Court and should call upon it to be vigilant and jealous in examining the evidence adduced in support of the claim to establish the document, which ought not to be pronounced for unless the suspicion attaching to it is removed and the Court is judicially satisfied that the document propounded does express the true will of the deceased; and it follows from this that those who are instrumental in bringing about the inquiry are not wholly in the wrong, even if they do not succeed in their impeachment.

Order LXV., r. 14D, gives the Court full power to order that the costs of all parties shall come out of the legacies bequeathed by a testamentary document to the persons whose conduct, though unsuccessfully impeached, has been the real cause of the investigation.

THE question of costs is the only one calling for a report.

This was a probate action, in which the plaintiffs, Samuel Edward Child and Matthew Jervoise Jarvis, were executors

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under a will and codicil both dated March 6, 1913, of the deceased who died on May 17, 1913, and, as such, they sought to have a decree in favour of both documents. The defendants, William Osment, the lawful brother, and Florence Elizabeth Osment, the lawful widow, by their defence, said that the deceased purported to execute a will dated December 17, 1912, in addition to the two documents propounded by the plaintiffs, and, further, that all three documents were not duly executed according to the provisions of the statute 1 Vict. c. 26, that the deceased did not know and approve of the contents of the three documents at the time they respectively purported to be executed, and that the deceased was not of sound mind, memory, and understanding when he purported to execute the three documents respectively. By way of counter-claim the defendants said that the deceased made his true last will dated August 21, 1912, under which they were interested and of which William Osment was appointed executor, and the defendants claimed that the Court should pronounce against the three documents and in favour of the will dated August 21, 1912. The plaintiffs, in their reply and defence to the counter-claim, joined issue, and said that the will dated August 21, 1912, was revoked by the execution of the will dated December 17, 1912, which was in turn revoked by the execution of the will dated March 6, 1913, and the codicil thereto.

The case came on for trial before Sir Samuel Evans, President, and a special jury, and in the result the jury found in favour of the plaintiffs on all the issues, and Sir Samuel Evans, President, pronounced for the will and codicil dated March 6, 1913.

Le Bas (*Hume-Williams, K.C.*, with him), for the defendants. The costs should not follow the event. The inquiry was reasonable and proper and was brought about entirely by the conduct of the plaintiff Jarvis. The procedure adopted by him in obtaining the will was not the normal mode of procedure, but was one which entitled the relatives to obtain the decision of the Court that everything was properly in order. There has been no suggestion of undue influence or fraud, but the question was whether the testator, owing to his drinking habits, was a fit person to make a will.

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In the circumstances of the case, the costs of the defendants ought to come out of the estate, and, under the power given to the Court by Order LXV., r. 14D, the costs ought to come out of that part of the estate left to the plaintiff Jarvis.

W. O. Willis (*Barnard, K.C.*, with him), for the plaintiffs. No good cause has been shewn why the costs should not follow the event.

The plaintiff Jarvis acted reasonably and properly as far as his conduct towards the testator was concerned. There was nothing in the case before the Court to shew that the defendants, who thought fit to attack the will propounded by the plaintiffs, should have their costs. Jarvis acted in good faith, and the jury by their verdict found that he so acted and that he had done what was right and proper.

[SIR SAMUEL EVANS, PRESIDENT. Does not the very fact that a party prepares a will or writes out a will under which he himself benefits give rise in most cases to suspicion?]

That is admitted; but, if such suspicion is proved to have been unfounded after the hearing, the persons who have failed ought to bear the costs of the inquiry.

[SIR SAMUEL EVANS, PRESIDENT. How is the suspicion to be dissipated? By having the matter investigated in a judicial inquiry, which costs money.]

By the documents themselves; by looking at the scripts and making inquiries to ascertain what has been done.

[SIR SAMUEL EVANS, PRESIDENT. The script itself here is suspicious. When I say suspicious, I am not casting any slur at all upon Mr. Jarvis, because I assume that the jury—and they have a perfect right to do so—have accepted his story as the correct version after hearing the whole of the evidence. The very script "D" raised a suspicion, because only about three or four words there, without any figure at all, are in the handwriting of the testator. Then there is one initial which is probably meant to be "£" without the stroke across; it looks like "T," and then it stops short and you have the writing of somebody else.]

If, although the suspicion has been dispersed by the verdict of the jury, the Court still thinks it was a case for inquiry, the

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cases go to shew that each party may be left to pay his own costs.

If, as is now asked, the plaintiff Jarvis is to be mulcted in any portion of the 1000*l.* secured to him by the verdict of the jury, it might be said that Mr. Child ought also to pay some portion of the costs out of his legacy. As a matter of argument, why should it be done in the one case and not in the other?

The costs that the executors have been put to in proving the will would, in the ordinary course, come out of the residuary estate, because the specific legacies have the first claim upon the estate.

[SIR SAMUEL EVANS, PRESIDENT. Cannot I order that all the costs shall come out of the specific legacies, and that they shall not come out of the share of the minors?]

That would be a new departure, and would be stultifying the verdict of the jury, which has exonerated Mr. Jarvis from all blame in this matter. But if the Court thinks this is a case for ordering costs out of the estate at all, the specific legatees and those interested in the residue might be ordered to bear the costs rateably, in proportion to the amounts coming to them respectively.

Le Bas in reply. The rule is wide and, it is submitted, was meant to meet such a case as this. It is difficult to see why the minors, who are not represented, should have to bear any part of the costs, either of the plaintiffs or defendants.

SIR SAMUEL EVANS, PRESIDENT. It is well established that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and cause it to be vigilant and jealous in examining the evidence in support of the instructions for the will; it ought not to pronounce for the document unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. That is the principle, and that principle is applicable here, although the tribunal investigating the suspicious circumstances and deciding the matter is a tribunal consisting of a special jury presided over by the judge. As was said by

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Lord Penzance in another case, "It is the function of this Court to investigate the execution of a will and the capacity of the maker, and, having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial inquiry is in a manner enforced upon it. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong even if they do not succeed." (1) Now I do not want to say a word at this stage of the case which would seem to indicate that I differ in the slightest degree from the verdict of the jury, and I do not want to say a word which Mr. Jarvis himself or anybody else might think threw any doubt upon his bona fides in the transaction. The matter has now been investigated, and it must be taken by the verdict of the jury, who were directed as to the law, that they are satisfied that the circumstances of the suspicion excited in this case have been sufficiently explained in the inquiry which has taken place. They, as they were entitled to do, must have accepted the explanation of Mr. Jarvis, and therefore no blame is cast upon him.

But in deciding this question of costs I must go back further.

We are now at the end of this inquiry which has been brought about by the action of the defendants, the circumstances have been explained, and the jury have been able to return the verdict which they have, which declares these two documents to be valid. I think there can be no doubt that there were fair circumstances of doubt or suspicion in regard to this will before the circumstances were explained. Mr. Child was at the office when Mr. Osment went there. One might almost say he took him there. He was his constant companion. He had been financing him. The solicitor took instructions when there was nobody present besides the testator and himself. There were no written instructions from the testator which would enable anybody to draw up the script for which the jury asked, I think appreciating the importance of it. It had upon it four words written by the testator in the corner, and the beginning of

(1) *Mitchell and Mitchell* v. *Gard and Kingswell* (1863), 3 Sw. & Tr. 275, at p. 277.

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some other word. There it stops, and the whole of the rest of that script, which contained the written instructions, was in the handwriting of the solicitor himself. He benefited to the extent of 1000*l.* He did not suggest independent advice or even further consideration. He did say, "Why should I have it?" and the testator said, "Why should not you? You have been a good friend to me." He said, "I have not been a friend to you. You have paid me for what I have done." The testator then said, "I want you to have it." The solicitor then says that there was no further attempt to dissuade the man from making him the object of his generosity. He took instructions also in the same way for 200*l.* to be given to his clerk, which was a gift to one who was practically a stranger. I do not make any order in this case which will affect the 200*l.* which was given to Jackson, because I doubt whether I have the power to do so, but I think I have full power under the rule to deal with the costs with reference to the legacies which have been left to Mr. Jarvis and to Mr. Child. Mr. Child is one of the executors with Mr. Jarvis, and he is also a plaintiff.

The order I make is that the costs of all parties, namely, the defendants' and the executors' costs, shall come out of the portion of the estate which was devised to the executors as beneficiaries under the will. In exercising this power, I am pleased to be able to allow the property which was devised to Gertrude Osment to go to her untouched and undiminished, and especially to be able to do what the Court has the duty to do, namely, to protect the infants, who are not parties to this litigation, by saying also that the residue, which was left by the testator to them under the will, shall remain undiminished without being burdened by any costs of these proceedings.

Solicitor for plaintiffs: *George F. J. Jarvis.*

Solicitors for defendants: *C. V. Young & Cowper.*

H. D. G.

PERRIN *v.* PERRIN.
POWELL *v.* POWELL.

1914
March 9, 30;
April 24, 25.

Restitution of Conjugal Rights—Service of Citation and Decree out of the Jurisdiction—New Divorce Rules.

In a suit for restitution of conjugal rights, where it appears from the petition that the parties to the suit are domiciled in England at the date thereof; or that they had a matrimonial home in England at the time when cohabitation ceased; or that they were both resident in England at the time of the institution of the suit, the citation and sealed copy of the petition may be served either within or without His Majesty's dominions; and when a suit for restitution of conjugal rights has been duly instituted, and a decree has been made therein, such decree may be served on the respondent either within or without His Majesty's dominions.

THESE were two suits in which questions arose as to the validity of service, out of the jurisdiction, of the citation or decree in proceedings for restitution of conjugal rights.

In *Perrin* v. *Perrin*, which was an undefended suit by the wife for restitution of conjugal rights, the parties were married in England in 1904, their domicil and matrimonial home being also in England.

The husband left the wife in November, 1912, but there was no suggestion that he had since changed his domicil.

The petition was filed in September, 1913, and the citation and sealed copy of the petition were served in Canada, where the husband had obtained employment.

Evidence in support of the petition was heard on March 9, 1914, when Sir Samuel Evans, President, adjourned the case for argument as to the jurisdiction to effect service abroad.

March 30. *W. T. Lawrance*, for the petitioner. The element of domicil was absent in the case of *Countess de Gasquet James* v. *Duke of Mecklenburg-Schwerin* (1): it is present in this case. The present petitioner proved that she lived with her husband in Bristol for some years, the husband being a domiciled Englishman. At the time when cohabitation ceased the parties were

(1) *Ante*, p. 53.

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living at Bristol. The husband left home one morning, ostensibly to go to business, but he did not return; and some time afterwards he went to Canada. It was there that the citation was served upon him.

Where the elements of residence and domicil are present in a suit, it is submitted that this Court has jurisdiction to serve the citation anywhere; and, even so, where either domicil or residence within the jurisdiction is proved.

It is doubtful whether the case referred to really decided that in no event could a citation be served out of the jurisdiction: it was necessary for the purposes of that particular case to go so far. By the Matrimonial Causes Act, 1857, s. 22, the practice of the Divorce Court was to follow the principles and rules of the Ecclesiastical Courts. Theoretically the jurisdiction of those Courts was limited to the dioceses, but such a rule was departed from by a system of letters of request from diocese to diocese (1), and by an indulgent interpretation of "dwell" and "inhabit" in the Statute of Citations. (2) In *Dasent* v. *Dasent* (3) service was effected at St. Vincent in the West Indies. The only reported case of service of a citation for restitution of conjugal rights out of the jurisdiction in the Ecclesiastical Courts was the case of *Whitcomb* v. *Whitcomb* (4), where a citation taken out in the diocese of London was served by letters of request in the diocese of Hereford. The cases of *Chichester* v. *Donegal* (5) and *Warrender* v. *Warrender* (6) were both quoted in the judgment of that case. In Burn's Ecclesiastical Law (7) the case of *Chichester* v. *Donegal* (5) is commented on.

Dr. Phillimore in the case of *Collett* v. *Collett* (8) argued that service of the citation was not to be treated as service of process, but merely as notice; and Dr. Lushington said: "But in fact it is not a process at all, and it is a misnomer to call it so; it is notice of process."

(1) Burn's Ecclesiastical Law, 9th ed., vol. iii., p. 249.
(2) 23 Hen. 8, c. 9.
(3) (1849) 7 Notes of Cases, 126 1 Robert. Ecc. 800.
(4) (1840) 2 Curt. 351.
(5) (1822) 1 Add. 5, at p. 19.
(6) (1835) 2 Cl. & F. 488.
(7) 9th ed., vol. iii. at p. 253.
(8) (1843) 2 Notes of Cases, 504, at pp. 507, 510.

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In cases of doubt the Court inclined in favour of jurisdiction: *Grignion* v. *Grignion*. (1) In Halsbury's Laws of England (2) it is stated that "if the defendant entered an appearance to the citation or took no notice of it," (as in this case) "it was assumed that the party waived the objection to the jurisdiction, and the suit proceeded and was heard and decided . . . ." Unless "Every such petition" in s. 42 of the Matrimonial Causes Act, 1857, included petitions for restitution of conjugal rights which were referred to in s. 17, there was nothing which referred to service of such petitions. In the case of *Yelverton* v. *Yelverton* (3) the respondent, a domiciled Irishman, was served with a petition for restitution in Glasgow; no point was raised as to the service, the only point was domicil.

[SIR SAMUEL EVANS, PRESIDENT. There is an extraordinary proviso at the end of s. 42 of the Matrimonial Causes Act, 1857, which empowers the Court to dispense with service altogether.]

In the case of *Bateman* v. *Bateman* (4) Sir Francis Jeune gave leave to serve a petition for restitution of conjugal rights out of the jurisdiction on condition that an affidavit was filed shewing that the respondent was domiciled in England, and previously to this Gorell Barnes J. gave leave to serve a respondent, who was a domiciled Englishman, in Glasgow. Subsequently, Sir Francis Jeune gave direction to the Principal Registry that when an English domicil is shewn in a petition for restitution the citation may issue without any special leave, wherever it is to be served. That direction was acted upon recently in the case of *Cowley* v. *Cowley* (5), where the respondent was served with proceedings for restitution of conjugal rights in Paris, and also in the case of *Buckley* v. *Buckley* (6), where the proceedings for restitution of conjugal rights were served on the respondent in Ireland.

The principle laid down in *Hardie* v. *Hardie* (7) and *Bateman* v. *Bateman* (4) has been acted upon since 1901, and, even if ultra vires, should not now be disturbed: Halsbury, Laws of

(1) (1828) 1 Hagg. Ecc. 535.
(2) Vol. xi., pp. 507, 508.
(3) (1859) 1 Sw. & Tr. 574, 586.
(4) [1901] P. 136.
(5) (1913) 29 Times L. R. 690.
(6) Not reported.
(7) (1901) 70 L. J. (P. & M.) 29.

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England(1); Maxwell's Interpretation of Statutes (2); *London County Council* v. *Erith Parish* (3); *Morgan* v. *Fear*. (4)

[SIR SAMUEL EVANS, PRESIDENT. What do you say as to my power to make new rules?]

That is referred to on p. 12, par. 29, of Rayden on Practice and Law in the Divorce Division. [He also referred to the Judicature Act, 1875 (5), and the Rules Publication Act, 1893. (6)]

Cur. adv. vult.

In the case of *Powell* v. *Powell* the parties were married in 1895 at a register office in England. They afterwards cohabited in England, and the only child of the marriage was born in 1897. Both parties were members of the theatrical profession and were domiciled and resident in England at the date of the petition for restitution of conjugal rights, which was filed in October, 1911, and a decree in which was pronounced by Bargrave Deane J. in January, 1912, by which time the respondent (husband) had gone to Australia. This decree, which ordered him, within three months after service, to return home to his wife (the petitioner) and render to her conjugal rights, was served upon him in Melbourne on March 27, 1912, but was not obeyed. The respondent returned to England in December, 1913, and the present petition for dissolution of marriage, on the grounds of adultery and statutory desertion, was filed and served on the respondent in February, 1914.

The suit was undefended.

Bayford, for the petitioner.

April 24. SIR SAMUEL EVANS, PRESIDENT. I shall be delivering my considered judgment in the case of *Perrin* v. *Perrin* to-morrow. I will deal with this case at the same time.

Cur. adv. vult.

April 25. SIR SAMUEL EVANS, PRESIDENT. In the case of *Perrin* v. *Perrin* the parties to the suit were domiciled in

(1) Vol. xxvii., p. 143, art. 266.
(2) 4th ed., p. 459; 5th ed., p. 491.
(3) [1893] A. C. 562, at p. 599.
(4) [1907] A. C. 425, at p. 429.
(5) 38 & 39 Vict. c. 77, s. 18.
(6) 56 & 57 Vict. c. 66.

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England, but before the institution of the proceedings the husband, who is the respondent, left this country and went to Canada, and service of the citation and petition was effected upon him in Montreal.

That matter was called to my attention by the petitioner's counsel in view of some observations made by me recently in the case of *Countess de Gasquet James* v. *Duke of Mecklenburg-Schwerin.*(1)

The decision in that case did not affect people domiciled in this country, because, in that case, the facts were that the petitioner and respondent belonged to another domicil and had never even resided in this country. The decision, therefore, stands.

In the course of my judgment, I discussed various points arising with reference to service out of the jurisdiction in suits for restitution of conjugal rights.

In the case of *Perrin* v. *Perrin* counsel for the petitioner delivered an able argument going through many authorities, dealing first of all with the powers and practice which he argued prevailed in the Ecclesiastical Courts in reference to matrimonial suits; and also under the Act of 1857 (2), and the subsequent Act (3) dealing with the consequences of disobedience to a decree of restitution of conjugal rights; and, in any event, he argued that there had been a course of previous decisions, and that even if they had no authority under any Act of Parliament, yet the course of those decisions had been such that it ought to continue.

I have looked into these matters and it appears to me that the practice has not been uniform and that the jurisdiction is, to say the least of it, doubtful. In fact, I see no reason to withdraw anything that I said in my recent judgment already referred to.

I think it very desirable that there should be no longer any doubt with reference to the practice as to service of proceedings in suits for restitution of conjugal rights, not merely in cases where the parties are domiciled in England, but also in cases

(1) Ante, p. 53.

(2) The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).

(3) The Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68).

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where the parties are resident here. I think by far the best way to deal with these matters is to put an end to all doubts and to deal not only with service of proceedings in cases of domicil, but also in cases of residence in this country. I have accordingly determined to make new rules dealing with these matters, and these rules will, I hope, in due course become law under the provisions of the Matrimonial Causes Act, 1857.

These rules will be two in number and will deal not only with service of citations and petitions, but also with service of decrees.

They will be in the following terms :—

"Rule 221. In a suit for restitution of conjugal rights, when it is stated in the petition, either that the parties to the suit were domiciled in England at the time of the institution thereof; or that they had a matrimonial home in England at the date when their cohabitation ceased; or that they were both resident in England at the time of the institution of the suit, the petition and citation may be served either within or without His Majesty's dominions."

"Rule 222. When a suit for restitution of conjugal rights has been duly instituted, and a decree is made therein, such decree may be served either within or without His Majesty's dominions."

In 1901 there were two decisions, one of which, *Bateman* v. *Bateman* (1), I dealt with in that judgment. The other was *Hardie* v. *Hardie* (2), which is reported along with *Bateman* v. *Bateman* in the *Law Journal* Reports. (2)

I can follow the course adopted in those cases in the suit now before the Court; and I therefore make a decree of restitution of conjugal rights, with costs, and order that the same be obeyed within three months after service thereof.

In the other case, *Powell* v. *Powell*, the petition for restitution of conjugal rights was served in Melbourne. The case was heard before me yesterday and disobedience to the decree which had been pronounced upon that petition was relied on as constituting statutory desertion, and, coupled with the adultery proved, as founding a claim for dissolution of marriage.

(1) [1901] P. 136. (2) 70 L. J. (P. & M.) 29.

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I need not repeat what I have just said in the case of *Perrin* v. *Perrin*. I have dealt in the new rules with this kind of case too.

But in the present case I am prepared to follow the decision in *Dicks* v. *Dicks* (1), and I pronounce a decree nisi with costs, and I give the petitioner the custody of the child.

Solicitors: *Carthew, Wheeler & Hancock, for Barry & Harris, Bristol; Petch & Co.*

H. D. G.

THE UMONA.

1913 *Nov.* 14, 17, 21, 26; *Dec.* 8. 1914 *April* 23.

[1912 U. 809.]

Admiralty—Damage—Collision between Steamship and laden Barge in tow of Tug—Steamship and Tug to blame—Claim by Owner of Cargo on Barge—Division of Loss—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1; *s.* 9, *sub-s.* 4.

A steamship and a dumb barge, in tow of a tug, came into collision in the river Thames, and the cargo of tea laden on the barge sustained damage.

The owners of the tug were, for the time being, owners of the barge, and they, with the owners of the cargo laden on the barge, brought an action of damage against the owners of the steamship, who counter-claimed against the owners of the tug.

The Court found that the collision between the steamship and the barge was due to the fault of the steamship and of the tug, and that—in accordance with the provisions of the Maritime Conventions Act, 1911, s. 1 and s. 9, sub-s. 4—the liability to make good the damage or loss should be in the proportion of three-fourths to one-fourth; but the owners of cargo on board the barge claimed, as innocent parties, to recover the whole of their damage from the owners of the steamship:—

Held by the President (Sir Samuel Evans), that as the tug controlled the navigation of the barge, and both the tug and the barge were in charge of the servants of the owners of the tug, by whose fault the damage was in part caused, the principle laid down in *The Milan* (1861) Lush. 388, applied, and, therefore, the owners of the cargo could only recover from the owners of the steamship three-fourths of their damage.

The Devonshire [1912] A. C. 634 distinguished.

ACTION of damage by collision.

The plaintiffs were the Union Lighterage Company, Limited, owners of the tug *Dido*, and bailees for hire of the dumb barge

(1) [1899] P. 275.

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Ellen, and the Balijan Tea Company, Limited, owners of cargo laden on the barge *Ellen*.

The defendants, and counter-claimants, were the owners of the steamship *Umona*.

The steamship and the tug were found in fault in unequal proportions, and the case is reported on the question of the extent of the claim, against the owners of the steamship, by the owners of the damaged cargo on the barge which was being navigated by the servants of the owners of the tug.

On November 21, 1912, about midnight—the weather being fine and clear, with little wind, and the tide first hour's ebb of the force of one and a half to two knots—the plaintiffs' steam tug *Dido*, of 66 tons gross register, with engines of 41 horse power nominal, was in the lower part of Erith Rands, proceeding up the river Thames from Tilbury Dock to Blackwall with six laden barges in tow in three ranks of two each, the dumb barge *Ellen*, of the port of London, of 48½ tons register, with a cargo of tea, and manned by one hand, being the port side barge of the second rank. The *Dido* was exhibiting the regulation masthead towing and side lights, and a stern light, on the aftermost port side craft in tow of her, was also being exhibited.

In these circumstances those on board the *Dido* observed distant about half a mile, and bearing a little on the starboard bow, the two masthead lights, and then the red light of a vessel which proved to be the steel screw steamship *Umona*, of London, of 3735 tons gross register, with engines of 497 horse power nominal, and manned by a crew of 76 hands, proceeding down Erith Rands, compulsorily in charge of a Trinity House pilot, in the course of a voyage from the East India Docks to Natal with passengers and a general cargo. She was making between seven and eight knots, and her regulation lights were being duly exhibited.

According to the defendants, those in charge of the *Umona*, on approaching Crayfordness, sighted the two white towing lights and the red light of a steam tug which proved to be the *Dido*, about half a mile distant, and bearing one and a half to two points on the starboard bow. After an exchange of whistle signals and movements of the helm, the details of which are not material

for the purposes of the present report, the steamship *Umona* came into collision with the barge *Ellen*, the barge sustaining so much damage that she had to be beached to avoid sinking in deep water. Three of the other barges were also damaged, and the cargo of the *Ellen* became practically a total loss. The *Umona* sustained some damage to her stem.

The action was tried on November 14, 17, and 21, and on November 26, 1913, the President (Sir Samuel Evans), who was assisted by two of the Elder Brethren of the Trinity House, came to the conclusion that both those in charge of the steamship *Umona* (not the pilot alone) and those in charge of the tug *Dido* were to blame for the collision, and pronounced the steamship in fault to the extent of three-fourths and the tug one-fourth.

In view of the terms of s. 1 and s. 9, sub-s. 4, of the Maritime Conventions Act, 1911 (1), the question of the liability of the owners of the *Umona* to the owners of the cargo on the *Ellen* was reserved, and, as the interests of the owners of the barge and of her cargo might be in conflict, it was arranged that the cargo owners should be separately represented.

1913. Dec. 8. *Laing*, *K.C.*, and *H. C. S. Dumas*, for the plaintiffs, the Union Lighterage Company.

C. Robertson Dunlop, for the plaintiffs, the Balijan Tea Company.

Bateson, *K.C.*, and *D. Stephens*, for the defendants, the owners of the steamship *Umona*.

The arguments of counsel sufficiently appear from the judgment, the contention on behalf of the plaintiffs, the owners of

(1) 1 & 2 Geo. 5, c. 57, s. 1 (1.): "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault. . . . ."

Sect. 9 (4.): "This Act shall apply to any persons other than the owners responsible for the fault of the vessel as though the expression 'owners' included such persons, and in any case where, by virtue of any charter or demise, or for any other reason, the owners are not responsible for the navigation and management of the vessel, this Act shall be read as though for references to the owners there were substituted references to the charterers or other persons for the time being so responsible."

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the cargo of tea on board the barge *Ellen*, being that they, as "innocent" parties, were entitled to the full amount of their claim against the owners of the steamship *Umona*. In addition to the cases mentioned in the judgment the following were referred to: *The Quickstep* (1); *The American and the Syria* (2); *The Englishman and the Australia* (3); and *The Bernina*. (4)

Cur. adv. vult.

1914. April 23. THE PRESIDENT (SIR SAMUEL EVANS). By the Maritime Conventions Act, 1911, vessels are personified in language which has been commonly used in shipping affairs and Admiralty cases. Such phrases as "the fault of vessels," and "loss to vessels, cargoes, freight, or property on board" mean, of course, the fault of the owners of the vessels or their servants, or persons for whom they are responsible; and loss to the owners of, or persons interested in, vessels, cargoes, freight, or property on board.

Upon the facts of this case, I decided that the collision between the steamship *Umona* and the dumb barge *Ellen* was due to the fault of the *Umona*, and of the tug *Dido*, which towed the barge *Ellen*, with five other barges; and I found the degrees of fault to be, as to three-fourths on the part of the *Umona* and as to one-fourth on the part of the tug *Dido*.

The first-named plaintiffs, the Union Lighterage Company, were the owners of the tug *Dido*, and also, as bailees for hire, the owners of the barge *Ellen*. They were also the owners of some, if not all, of the other barges, either absolutely or as bailees. The tug directed and controlled the navigation of the barges. It was admitted that the tug and all the six barges were in charge of servants of the Union Lighterage Company at the time of the collision. The second-named plaintiffs, the Balijan Tea Company, were the owners of the cargo carried in the *Ellen*.

The questions now to be decided are (1.) what damages (if any) are the Union Lighterage Company entitled to recover against the defendants in respect of the injury caused to the barge *Ellen*;

(1) (1890) 15 P. D. 196.
(2) (1874) L. R. 6 P. C. 127.
(3) [1894] P. 239.
(4) (1888) 13 App. Cas. 1.

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and (2.) what damages (if any) are the tea company entitled to recover against the defendants in respect of the injury to or loss of the cargo laden in that barge. In either case, do the plaintiffs respectively recover all or nothing, or a proportion?

In my opinion the case falls to be decided under, and in accordance with, s. 1 of the Maritime Conventions Act, 1911, read with s. 9, sub-s. 4. The extent, width, and effect of this section have recently been described by the Court of Appeal in *The Cairnbahn.* (1)

The facts proved establish that the servants of the owners of the *Ellen* were to blame for the collision. That they navigated from the tug does not affect the liability of the owners of the tug and barge, any more than the liability on land would be affected if a driver of a steam traction engine drawing wagons belonging to the same owner negligently caused one of his wagons to come into collision with and injure a passer-by or a carriage.

The result of my findings is that the *Ellen* was damaged partly by the fault of the servants of her owners. These owners, therefore, in accordance with s. 1 of the Maritime Conventions Act, 1911, are entitled to recover in proportion to the degree of fault found and to be applied, namely, three-fourths of this damage, from the defendants. As to the tea company, their cargo was carried in the *Ellen*, which must be deemed to be in fault by reason of the negligence of her owners' servants. I was asked to hold that the *Ellen* was "an innocent barge" within the meaning of the decision in *The Devonshire.* (2) I cannot so hold. The facts in that case were quite different; and the decision does not apply to the present case. It is to be observed that neither of the two sets of plaintiffs raise any such point in their defence to the counter-claim in answer to the allegation that "the collision was caused by the negligent navigation of the tug *Dido* and her craft by the plaintiffs and their servants." The tea company, therefore, in accordance with the section referred to—which incorporates the doctrine of *The Milan* (3) and *The Drumlanrig* (4) upon this point, save as to the proportions

(1) [1914] P. 25.
(2) [1912] P. 21; [1912] A. C. 634.
(3) Lush. 388.
(4) [1911] A. C. 16.

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of the division of loss—are entitled to recover from the defendants only three-fourths of the damage to their cargo. Judgment must be entered accordingly, and the amount of the damage to be paid or suffered by the parties is to be ascertained by reference to the registrar and merchants in the usual way.

Solicitors for plaintiffs, the Union Lighterage Company and others: *Keene, Marsland, Bryden & Besant.*

Solicitors for defendants, the owners of the *Umona: Thomas Cooper & Co.*

T. L. M.

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April 30; *May* 1.

THE BEDEBURN.

[1912 C. 3605.]

Admiralty—Salvage—Claim by Compulsory Pilot to rank as a Salvor.

The defendants' steamship, on a voyage from the Tyne to Marseilles, lost her propeller in the neighbourhood of the Royal Sovereign light-ship, and, drifting up channel, was brought to anchor off Rye after bumping several times; but without sustaining material damage. In answer to flares the Winchelsea lifeboat went out to her, and then a tug, which came up, was sent to fetch another tug. The two tugs, with the assistance, later on, of a third, proceeded to tow the vessel up channel, and, off Dungeness, a compulsory pilot boarded her, and took charge of the vessel to Gravesend.

The defendants admitted that salvage services had been rendered by the three tugs and by the crew of the lifeboat; but denied the right of the pilot to claim remuneration on salvage terms:—

Held by the President (Sir Samuel Evans), that the claim of the pilot must be disallowed, but, in the circumstances, without costs, for though the vessel was disabled, and, in consequence, sheered heavily in the bad weather prevailing, and, whilst in charge of the pilot, the hawser of one of the tugs fouled an anchor of the defendants' vessel, and there was some apprehension of risk from leakage, still the pilot had not been required to do, and had not in fact done, anything more than ought to be done by a pilot performing his ordinary pilotage work for pilotage reward.

It is not in the interests, either of shipowners and their navigating

servants, or of the pilots themselves, to give any countenance to the idea that a pilot, compulsorily in charge of a disabled vessel, may easily convert himself into a salvor.

CONSOLIDATED ACTIONS OF SALVAGE.

The plaintiffs were :—

The owners, masters, and crews of the steam tugs *Conqueror* and *Champion*.

William Peverley, Trinity House pilot.

The Dover Harbour Board, the owners, and the master and crew of the steam tug *Lady Crundall*.

James Morris Downey and twelve others forming the crew of the Rye lifeboat *John William Dudley*.

The defendants were the owners of the steamship *Bedeburn*, her cargo and freight.

The defendants admitted that salvage services had been rendered by four out of the five claimants, namely, the tugs *Conqueror*, *Champion*, and *Lady Crundall*, and the crew of the lifeboat, so that the case, in respect of their services, resolved itself into a question of amount. This report is, therefore, limited to the question of the disallowance of the fifth claim for salvage, namely, that of the Trinity House pilot compulsorily in charge of the disabled vessel.

The *Bedeburn* is a steel screw steamship of the port of Newcastle of 3499 tons gross register, 345 feet long, engines of 260 horse power nominal, drawing 21 feet 10 inches, and manned by a crew of twenty-seven hands. She was on a voyage from the Tyne to Marseilles with a cargo of coal. Her value, for the purposes of the case, was agreed at 19,000*l*. The value of the cargo was 68,068 marks, and the net freight at risk 1235*l*.

The following statement of the facts, so far as material on the question of the services of the pilot, is taken from the judgment of the President :—

The defendant vessel (the *Bedeburn*) started from the Tyne on December 24, 1912, and encountered very bad weather on her voyage down until she got somewhere in the neighbourhood of Hastings. There she lost her propeller. It was observed about 4 o'clock, or thereabouts, on December 26 that the engines were racing heavily, and in the result it was ascertained that the

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propeller had entirely disappeared. She drifted before the wind, controlled to some extent, as far as she could be controlled in the circumstances, by the action of the helm, and she got to the place described, in Rye Bay, about two miles from Rye Harbour. There is no doubt she was in some difficulty.

There are five sets of plaintiffs. The lifeboat, with a crew of thirteen hands, was first upon the scene, and then there appeared the tug *Conqueror*, which was afterwards sent to obtain other assistance. By her means the assistance of the *Lady Crundall* was obtained, and they together were able to tow the vessel from the position in which she then was towards any harbour where she could be put into dry dock. They towed her as far as Dungeness, and the pilot there came on board, who claims not merely for pilotage, but also for salvage services. With the assistance and by the guidance of the pilot, and with the motive power of the two tugs, the vessel was towed in ordinary course up as far as the Nore, and there, some further difficulty having arisen by reason of the parting of the hawser of the *Conqueror*, the services of the *Champion* were requisitioned. From the Nore up to Gravesend the three tugs were conjointly towing the vessel.

1914. April 30. *Laing, K.C.*, and *C. Robertson Dunlop*, for the plaintiffs the owners, masters, and crews of the steam tugs *Conqueror* and *Champion*, and William Peverley, Trinity House pilot.

Bateson, K.C., and *Hugh C. S. Dumas*, for the plaintiffs the owners, master, and crew of the steam tug *Lady Crundall*.

Batten, K.C., and *Lewis Noad*, for the plaintiffs the coxswain and crew of the lifeboat.

Dawson Miller, K.C., and *R. H. Balloch*, for the defendants, the owners of the steamship *Bedeburn*, her cargo and freight.

With reference to the claim of the pilot to be regarded as a salvor, and in addition to the case mentioned in the judgment, the case of *Akerblom* v. *Price* (1) was cited, together with the passages setting out at length the judgment in that case, and the earlier cases referred to, in Kennedy on Salvage, 2nd ed. (1907), pp. 92 to 96.

(1) (1881) 7 Q. B. D. 129.

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May 1. THE PRESIDENT (SIR SAMUEL EVANS). [After stating the facts already set out, the learned judge proceeded :]

The question arises in respect of four of these claimants, what the amount ought to be which they should have as remuneration for the salvage services which it is admitted they rendered ; and with regard to the fifth claimant, the pilot, the first matter to be determined is whether it has been shewn in this case that he is entitled to any salvage award at all, or whether he should only receive the ordinary pilotage remuneration ; and if he is entitled to any salvage award, what the amount ought to be.

The vessel was in command of a master who had been on duty from the time he started from the Tyne until the vessel lost her propeller, and, indeed, for many hours afterwards, in fact, until she arrived at Gravesend. From the time he started on the voyage until the difficulties first began he had been on active duty, doing active service, for about fifty hours. Notwithstanding that, he not only sustained his physical energy, but he was fully alive mentally to the difficulties in which he was placed, and he acted with great courage and in a very seamanlike way in getting the vessel into the position in which she was at the time the lifeboat came up. It now appears, and is admitted by the master, that the vessel had bumped upon two or three occasions before she had got into that position. It was feared —not an unreasonable apprehension—that the vessel was leaking as a result of the bumping, but as it turned out there was no leaking at all.

The position has been approximately fixed in which the vessel was when the flares attracted the attention of the coastguard, who took prompt steps to send out the lifeboat. It was not the best or the safest position for the vessel; but, notwithstanding that, there was not very great danger, if she could be got away, as she was got away, before the falling of the tide, of any further damage occurring to her. Nothing has been said by counsel for the defendants to detract from the useful and valuable services of the crew of the lifeboat, and I think if I allow them a sum of 140*l.*, to include, of course, whatever expenses they have to pay out,—and I agree they come to about 36*l.*—I shall be allowing a sum not more than it is fair to call

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upon the owners of the salved vessel to pay, and which I trust will be considered a fairly ample award for the salvage services of the lifeboat's crew.

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The *Conqueror* was the first tug upon the scene. She was despatched by the master of the vessel, already in some distress, to endeavour to get the services of another tug. It was felt by the master, no doubt, that if he was to be towed to London or any intermediate port like Dover, for the purpose of putting the vessel into dry dock, it would not be safe to entrust a vessel in that condition to the *Conqueror* alone. The fact that he sent the *Conqueror* away, coupled with the fact that he refused the services, in her absence, of the Dutch tug which proffered assistance, shews that the master himself did not think he was in a position of very great danger. He was content, having been there some time, to wait longer until the *Conqueror* returned. The *Conqueror* did return, and some few hours later the *Lady Crundall* came to the assistance of the vessel. She is a valuable and powerful tug. With the assistance of the lifeboatmen the two tugs were made fast, and they towed the vessel as far as Dungeness before the pilot came on board, and I doubt whether, if this had not been a compulsory pilotage district, the pilot would have been taken. However, this being a compulsory pilotage district, the master took him. From that point the pilot, no doubt, had to give orders not only to those upon the vessel itself, but also to the two tugs. That was by reason of the vessel, whose pilot he was, having lost her controlling power. The weather had moderated very much between midnight on the 26th and the early morning of the 27th, and when the pilot came on board he thought there was nothing unusual. He came on board in the ordinary course of his duties as the next pilot in turn, and the pilot, therefore, who must go on board and take the vessel up to Gravesend if she required to go there.

The serious question in this case is whether the pilot is entitled to salvage remuneration. I feel strongly that it would be a very undesirable thing, and a dangerous thing, to allow the character of the pilot to be changed from that of a man entitled to be paid for his services as a pilot into the position of a man

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who is a salvor. In nothing I am going to say in this case do I make any reflection upon the conduct of the pilot in this particular case, either in the work he did, or arising from the fact that he has claimed here for salvage services; but, speaking in the abstract, I think it is very desirable to keep pilots to their duties as pilots so far as one reasonably can. That is proper, I think, not only in the interests of navigation—the owners of vessels and their servants—but also necessary in the interests of the pilots themselves. It would be most undesirable to give any countenance to the idea that it is easy for a pilot to convert himself, by reason of some increased risk, from being a pilot into being a salvor. It would be undesirable for the shipping community at large, and for the respectable body of men constituting the pilots of the country, that any encouragement should be given to them to become searchers after salvage. I have asked the Elder Brethren a question similar to that asked by Barnes J. in *The Santiago* (1), but I wish to say this, first of all, that if I had to deal with this case alone I should have come to the same conclusion as the conclusion embodied in the advice which the Elder Brethren have given to me. I do not think anything was required to be done, or was in fact done, in this case more than ought to be done by a pilot in the course of his ordinary duty as pilot. The vessel to some extent was disabled, but it is not enough to shew that a vessel has been disabled, to give a right to the pilot to salvage reward. There must be something more. A pilot may be entitled to a salvage award where the vessel is not disabled. On the other hand, it does not follow because a vessel is disabled, more or less, that any salvage award must be given. There was nothing in the weather in this case after the pilot came on board to increase the risk. There was some sheering, no doubt, but that is not extraordinary risk; and what is relied upon here, chiefly, by the pilot, in support of his claim, is this. He says: "I was told the vessel bumped badly, and I was afraid there would be a leakage of water, and I advised there should be constant soundings." That, no doubt, increased the apprehension of risk, and involved the requisite precaution and care on the part of the pilot in the

(1) (1900) 9 Asp. M. L. C. 147, at p. 149.

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circumstances; but the bumping had taken place for the best part of twelve hours before the pilot came on board, and the master had taken prompt steps to ascertain whether or not there was any water leaking into the vessel, and there was none. That is the main matter put forward by the pilot himself. It is also said that grave difficulty was caused by reason of the fouling of the anchor and the rope of the *Lady Crundall* when the vessel arrived at Gravesend. I am not going to allocate blame to any one with reference to that, but it is a thing, obviously, which might occur on any voyage which was conducted by a pilot with the assistance of two or more tugs; and whatever discomfort or delay was caused, in these circumstances, I am of opinion, and am so advised by the Elder Brethren, that no risk was incurred by the pilot on this account outside that which ought reasonably to be contemplated by a pilot who undertook to do the work.

In the result, the conclusion to which I have come independently, and the answer which I have received from the Elder Brethren to the question I put to them, is that, having regard to the facts, the pilot in this case did not run more risk than any reasonable person ought to consider was covered by his contract of pilotage. In order to emphasize what I said earlier in my judgment with reference to the conduct of the pilot in this case, while I am going to disallow the claim of the pilot to salvage, I am not going to order him to pay the costs of the proceedings.

The amounts which I award to the three tugs are as follows:—*Conqueror*, 800*l.*; *Lady Crundall*, 700*l.*; and *Champion*, 120*l.*; which sums make, with the amount (140*l.*) awarded to the lifeboatmen, a total award of 1760*l.*

Claim of pilot to rank as a salvor disallowed.

Solicitors for the plaintiffs, the tugs *Conqueror* and *Champion*, and the pilot: *Thomas Cooper & Co.*

Solicitors for the plaintiff tug *Lady Crundall*: *Mowll & Mowll.*

Solicitors for the plaintiff lifeboatmen: *A. W. Kingcombe & Co.*

Solicitors for defendants, the owners of the *Bedeburn*: *Botterell & Roche*

T. L. M.

In the Estate of ROBERT WHITE.

1914
May 11.

Probate—Practice—Will—Offensive Paragraph—Omission from Probate.

Although it is not competent to the Court to strike out or expunge any part of a will merely because it contains objectionable matter, the Court may, nevertheless, order the omission from the probate of words in the will which are scandalous and defamatory and which do not affect any testamentary disposition or appointment contained in the will.

Motion to omit from the probate certain objectionable words in the will of the deceased.

Robert White died on April 10, 1914, leaving a will, dated February 6, 1913, by which he bequeathed all his "property of every sort or kind" to his brother and appointed him sole executor.

He stated in his will that he left nothing whatsoever to his wife (naming her and giving the name and address of her father), for reasons which he proceeded to give and which, while reflecting in no way on her chastity, were said to be scandalous and defamatory and would be painful to her and derogatory to her character if included in the probate.

The wife also stated that the said words were untrue.

The estate amounted to 200*l.* in personalty only.

J. G. Pease, on behalf of the executor, with the consent of the widow, moved that the words complained of should be omitted from the probate of the will. He did not desire to read the defamatory words in open Court. He relied on the decision of Sir Herbert Jenner Fust in *In the Goods of Wartnaby* (1) and of Sir C. Cresswell in *Marsh* v. *Marsh*. (2) The case of *In the Goods of Honywood* (3), where Lord Penzance rejected the motion, was, he submitted, distinguishable.

[Bargrave Deane J. There does not appear to be any principle laid down in any of the reported cases. In one case, there was no precedent; in another, the judge made a precedent; in a third, the judge exercised his discretion by refusing the

(1) (1846) 1 Robertson, 423. (2) (1860) 1 Sw. & Tr. 528.
(3) (1871) L. R. 2 P. & M. 251.

1914

WHITE, IN THE ESTATE OF.

application. Have you looked at *Curtis* v. *Curtis* (1), decided by Sir John Nicholl in 1825, and in which a still earlier case is referred to? I think those are the only four cases reported on the point.]

Apparently in *Curtis* v. *Curtis* (1) the application was to expunge the words from the will itself. In the present instance all that is asked is to omit the words from the probate, as in *In the Goods of Wartnaby*. (2)

BARGRAVE DEANE J. said there were only four cases reported on the point, and those were conflicting.

His own view was that a will ought not to be made the medium of slanderous statements, and that where in a testamentary document words were inserted which in no sense had any testamentary value or effect and could serve no useful purpose if left in, they should be omitted from the document itself; but as it appeared that in no reported case had the Court ordered the omission of such words from a will, and inasmuch as all that was asked by the present motion was that the words should be omitted from the probate, the order would go in this form. He was informed by the registrar that no copy would go out from the Probate Registry except a copy of the probate, and this, according to the order now made, would not contain the defamatory words.

Solicitors: *Engall & Crane.*

(1) (1825) 3 Add. 33.

(2) 1 Robertson, 423.

H. D. G.

[DIVISIONAL COURT.]

1914
May 13.

ADAMS *v.* ADAMS.

Husband and Wife — Separation Order — Adultery of Wife—Liability of Husband for subsequent Weekly Payments — Application in respect of Arrears—Refusal—Appeal — Summary Jurisdiction (Married Women) Act, 1895 (58 *& 59 Vict. c.* 39), *ss.* 7, 9, 11.

The decision of a Court of summary jurisdiction upon an information or complaint by a married woman alleging that payments due to her from her husband under an order made under the Summary Jurisdiction (Married Women) Act, 1895, are in arrear is not a matter in respect of which an appeal lies under s. 11 of that Act to the Probate, Divorce, and Admiralty Division.

Ruther v. *Ruther* [1903] 2 K. B. 270 followed.

This was an appeal on behalf of the wife from an order of a metropolitan police magistrate made on March 6, 1914, dismissing a summons under the Summary Jurisdiction (Married Women) Act, 1895 (1), issued at the instance of the wife on February 21, 1914, in respect of arrears of maintenance under an order made by another metropolitan police magistrate on September 7, 1908, whereby the husband had been ordered (inter alia) to pay 17*s.* 6*d.* a week to his wife.

On May 19, 1909, the wife consented to take 10*s.* a week in lieu of the 17*s.* 6*d.* a week.

On January 15, 1914, the husband took out a summons to discharge the order of September 7, 1908, on the ground of his wife's adultery, and the order was accordingly discharged on February 18, 1914.

The grounds for the dismissal of the summons issued on February 21, 1914, for arrears of maintenance were: that the wife's right to maintenance ceased from the date of her adultery, and not from February 18, 1914, the date of the discharge of the order of September 7, 1908; that he (the stipendiary) had no jurisdiction to make an order for payment of the arrears of maintenance, because the order of September 7, 1908, had been discharged before the issue of the summons on February 21,

(1) 58 & 59 Vict. c. 39.

1914

ADAMS v. ADAMS.

1914; and that, in any event, the wife was only entitled to maintenance at the rate of 10*s.* a week, and not 17*s.* 6*d.* a week as ordered on September 7, 1908.

The wife sought to have the order of March 6, 1914, set aside, and an order made against her husband for the payment of 22*l.* 5*s.* for arrears of maintenance under the order of September 7, 1908, or in the alternative that the matter be referred back to the magistrate for rehearing and adjudication.

The Respondent in person raised a preliminary objection to the hearing of the appeal by the Court on the ground that no order whatever had been made, and consequently there could be no appeal; and, further, that if there was an appeal at all, it should be by case stated to the King's Bench Division. [He cited *Ruther* v. *Ruther* (1) and *Griffiths* v. *Griffiths*. (2)]

Daniel Warde, for the appellant, submitted that, if an order was made on a summons for arrears of maintenance, an appeal from such order was to the King's Bench Division; but if no order was made (as in the case under consideration) an appeal could be brought to the Divisional Court of the Probate, Divorce, and Admiralty Division.

[Bargrave Deane J. referred to the head-note of *Ruther* v. *Ruther* (1) and pointed out that according to that case no appeal lay to the Probate, Divorce, and Admiralty Division in respect of applications for arrears of maintenance under the Act of 1895.]

Ruther v. *Ruther* (1) and *Matthews* v. *Matthews* (3) were different from the case now under consideration, inasmuch as in both those cases an order had been made as upon an affiliation order.

Sir Samuel Evans, President. Upon grounds satisfactory to the Court of King's Bench, it was held that an appeal from the decision of a Court of summary jurisdiction on an application for arrears of maintenance lies to the King's Bench Division and not to the Probate, Divorce, and Admiralty Division: *Ruther* v. *Ruther*. (1)

(1) [1903] 2 K. B. 270. (2) (1909) 73 J. P. 391.
(3) [1912] 3 K. B. 91.

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The President.

In the present case the order for maintenance was discharged before the application for arrears under the order was made. We express no opinion upon the effect of that. The application being for the enforcement of the order for maintenance, the magistrate refused to make an order, but if he had made an order, an appeal would lie to the King's Bench Division: *Ruther* v. *Ruther* (1); *Matthews* v. *Matthews*. (2) An appeal from a refusal upon a similar order should be to the same Court.

The preliminary objection by the respondent is a good one, and the appeal will accordingly be dismissed.

BARGRAVE DEANE J. I quite agree.

Appeal dismissed.

Solicitor for appellant (wife): *Walter H. Cowl.*

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.

1914

May 7, 15.

WELLS *v.* WELLS.

Counsel's Fees—Honorarium and not Debt—Non-Liability to Attachment in Hands of Solicitor—Judgment Debt—Garnishee Order—Invalidity.

Fees owing to counsel are not "debts" and cannot be attached or garnisheed as such.

Where a wife had commenced proceedings for a divorce against her husband, who was a barrister, and had obtained an order for payment of alimony pendente lite, and that order had not been obeyed:—

Held, that fees due to the husband, which had been received by a firm of solicitors and not paid over, were not debts and could not therefore be attached under a garnishee order obtained by the wife against the solicitors.

In re H. & C. Hall (1856) 2 Jur. (N.S.) 1076, and *Ex parte Colquhoun, In re Clift* (1890) 38 W. R. 688, explained.

APPEAL from a decision of the President of the Probate Division.

In proceedings for a divorce brought by Mrs. Wells against her husband, Mr. A. M. W. Wells, a barrister-at-law, an order

(1) [1903] 2 K. B. 270. (2) [1912] 3 K. B. 91.

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was made by consent on November 25, 1913, that Mr. Wells should pay to the petitioner alimony pendente lite at the rate of 660*l.* per annum by equal monthly payments of 55*l.* each, to commence from October 15, 1913. In compliance with this order alimony was paid down to January 15, 1914. Before the next payment was due the respondent Mr. Wells went abroad, having disposed of the whole of his property in this country, and having on January 19, 1914, executed to Harry Nye an assignment of all his outstanding fees subject to the trusts of an indenture of even date and made between the same parties. The trusts of the deed were to collect and get in the fees and to pay certain sums of money to persons named in a schedule to the deed in discharge of any claims which those persons might have against Mr. Wells, and subject thereto in discharge as the said H. Nye should in his discretion think fit of all or any moneys which might be or become due and payable by Mr. Wells in connection with his chambers in Lincoln's Inn, and subject thereto to hold the trust premises for the absolute use and benefit of the said H. Nye. On February 13, 1914, Nye gave notice of the assignment to Messrs. Slaughter & May, a firm of solicitors, from whom it appeared that there were due to Mr. Wells outstanding fees amounting to 417*l.* 10*s.*, of which the solicitors had actually received 290*l.* 12*s.* 6*d.* The instalment of alimony due on February 15, 1914, not having been paid, the petitioner Mrs. Wells obtained and served upon Messrs. Slaughter & May a garnishee order nisi attaching all debts owing or accruing due from them to Mr. Wells, and on February 24, 1914, the order nisi was made absolute by the registrar. From that order Nye and the judgment debtor appealed to the President, who held that counsel's fees were not debts and could not therefore be attached in garnishee proceedings. He accordingly reversed the decision of the registrar and set aside the garnishee order.

From that decision Mrs. Wells appealed.

Disturnal, K.C., and *Le Bas*, for the appellant. Two points arise upon this appeal—(1.) whether fees in the hands of the garnishees, and admittedly due to the judgment debtor as counsel, can be attached; (2.) whether the assignee and the

judgment debtor had any right of appeal to the President. It is submitted that only the garnishees could appeal against the order absolute: Order XLV., r. 1. But the first is the principal question. The learned President held that the fact that counsel's fees are not debts concluded the appellant's claim; but it is submitted that where fees due to counsel have actually been paid to the solicitor they can be recovered in an action for money had and received, and can be proved for in bankruptcy. The President founded his judgment on *In re Le Brasseur and Oakley* (1) and *Innes* v. *East India Company.* (2) In the former case the solicitors denied that the fees were due Lindley L.J. at p. 493 deals with the point.

[SWINFEN EADY L.J. It is essential to your case that the unpaid fees constitute a debt.]

Here money is paid by the clients to the solicitors for a specific purpose, and being acknowledged by the solicitors is recoverable from them: *In re H. & C. Hall* (3); *Ex parte Colquhoun, In re Clift.* (4) In *In re Le Brasseur and Oakley* (1) Lindley L.J. referred to *In re H. & C. Hall* (3) and did not disapprove of the decision.

[PICKFORD L.J. I do not think he agreed with it.]

Reverting to the other point, the judgment debtor cannot be heard to say that the garnishee order is wrong. Service of the order binds the debts in the hands of the garnishee: Order XLV., r. 2; and if he does not (as here) dispute the debt, execution may issue: Order XLV., r. 3. The position of a garnishee where there is no attachable debt is illustrated by *Randall* v. *Lithgow.* (5)

Leslie Scott, K.C. and *W. O. Willis,* for the respondents. The judgment appealed from is right on both grounds. Even if counsel's fees are not debts the assignment to Nye before the garnishee proceedings was perfectly good. The statute 13 Eliz. c. 5 does not apply to anything in respect of which execution will not issue. When considering whether that statute applies the first question is whether the property conveyed is subject to the payment of debts and liable to be taken in execution at the time of

(1) [1896] 2 Ch. 487.
(2) (1856) 25 L. J. (C.P.) 154.
(3) 2 Jur. (N.S.) 1076.
(4) 38 W. R. 688.
(5) (1884) 12 Q. B. D. 525.

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the fraudulent conveyance: May on Fraudulent Conveyances, 3rd ed., p. 13.

[PICKFORD L.J. Is not the sole question whether counsel's fees are debts?]

Yes. The cases in bankruptcy do not amount to more than this, that the Court will not allow fees which have been received by a bankrupt solicitor, and not paid over to counsel, to be distributed as part of the bankrupt's assets. That is merely an extension of the disciplinary jurisdiction of the Court. To hold that counsel can sue for fees which have been actually received by the solicitor would be contrary to well-established law. Under no circumstances and in no event can a barrister sue for his fees.

Disturnal, K.C., in reply.

Cur. adv. vult.

May 15. SWINFEN EADY L.J. read the judgment of the Court. (1) In this case Edith Winifred Wells has petitioned for a dissolution of her marriage with the respondent Arthur Manfred Wintle Wells, and the proceedings are pending.

On November 25, 1913, an order was made for the payment of alimony pending suit, after the rate of 660*l.* per annum by equal monthly payments of 55*l.*, commencing as from October 15, 1913. The instalments for the months ending November 15, 1913, December 15, 1913, and January 15, 1914, have been paid, but the instalment due February 15, 1914, remains unpaid.

The respondent has gone abroad and is alleged to have realized his available assets. By a deed dated January 19, 1914, he purported to assign to Mr. Harry Nye of Brighton the book debts owing to him in respect of "his profession or calling of barrister-at-law" as appearing in the books kept by him in that behalf, to hold the same subject to the trusts of an indenture of even date. The trust deed provided for the payment of the rent, rates, taxes, and other expenses due, or to become due, and payable in respect of the respondent's chambers in Old Square, Lincoln's Inn, and for other debts or claims.

On February 13, 1914, notice of this deed was given by

(1) Swinfen Eady L.J. and Pickford L.J.

Mr. Nye to Messrs. Slaughter & May, solicitors, by whom fees were owing to the respondent, and which Mr. Nye claims were assigned to him by the assignment. On February 17, 1914, the petitioner obtained a garnishee order nisi attaching all debts owing or accruing due from Messrs. Slaughter & May, the garnishees, to the judgment debtor. By an order of Mr. Registrar Pritchard dated February 24, 1914, the garnishee order was made absolute, and after reciting that the sum of 55*l.* remained due and unpaid under the order of November 25, 1913, it was ordered that the garnishees do forthwith pay the judgment creditor the debt due from them to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt and the costs of the garnishee proceedings, and that, in default thereof, execution may issue for the same.

Mr. Nye (as assignee under the deed) and the judgment debtor both appealed to the President against this order absolute and the President discharged it.

The present appeal is brought by the wife, the judgment creditor, who seeks to discharge the order of the President and to restore the order of Mr. Registrar Pritchard making absolute the garnishee order.

The appellant raised several points. First, she contended that the assignee and judgment debtor had no right of appeal to the President and that only the garnishee could appeal against the order absolute. There is no foundation for this contention. The assignee was clearly a person affected by the order and entitled to appeal, and as Order XLV., r. 1, provides for service of the order nisi on the judgment debtor, he becomes a party to the proceedings, and is entitled to appeal.

The appellant then urged that the President had decided that the deed of assignment under which Mr. Nye claimed was fraudulent and void against creditors, and particularly against the judgment debtor's wife, who at that time was a creditor, and that as Mr. Nye had not appealed from that decision he was bound by it, and that the deed of assignment was, for the purpose of the appeal, out of the question. In our opinion this contention is not well founded. There are certainly observations in the judgment of the President which go to shew that in his

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opinion the assignment to Mr. Nye was void, but the order of the President contained no adjudication on this point, nor was there evidence before him upon which he could judicially determine that matter. The order drawn up, by which alone Mr. Nye is bound, did not deal with the assignment in any way, and moreover was in Mr. Nye's favour. Mr. Nye opposed the garnishee order being made absolute, and the President adopted this view and discharged the order. The order was in his favour and did not prejudice him, and there was nothing for him to appeal against. The President by his order left the judgment creditor, the judgment debtor, and Harry Nye each of them to bear their own costs, but these costs were in the discretion of the judge and could not be made the subject of appeal.

On this appeal, the judgment creditor made Harry Nye a respondent, and he has filed evidence proving payments by him to creditors under the deed of trust, and exhibiting receipts for moneys so paid, including the receipt of the steward of Lincoln's Inn for rent of the debtor's chambers to Christmas, 1913, and for the supply of electric energy and rent of meter down to the same date. In our opinion it is not necessary further to deal with this question as there is not any adjudication that the deed is invalid; the evidence indeed before us points in a contrary direction. It will be sufficient to say that the deed remains unaffected by these proceedings in any way. Whether it is valid or not, and whether the assignee is entitled to receive the fees outstanding by reason of the deed, is left untouched by this judgment.

The question is whether the fees can be attached by garnishee proceedings. In our opinion fees owing to counsel are not "debts," and cannot be attached or garnisheed as such, nor can the garnishees be ordered to pay the amounts as "debts," nor can execution issue against them in default of payment. We are quite aware that the solicitors in question, Messrs. Slaughter & May, are ready to pay, and indeed are desirous of paying, to the proper person whatever may be due from them for counsel's fees earned by the judgment debtor, but they cannot be ordered in garnishee proceedings to pay the amount to the judgment creditor. It is settled beyond all question that counsel's fee is

not a debt but an honorarium, the fees are payable as a matter of honour and not of legal obligation ; see *Kennedy* v. *Broun* (1) and *In re Le Brasseur and Oakley*. (2) It was, however, urged that where the solicitor acknowledged that he had received from his lay client the money to pay counsel's fees, and that he actually had in hand the money, the position was different, that there was a legal obligation on him to pay, and that an action would lie against him for money had and received. This proposition is quite unfounded. These facts do not make the least difference as regards the right of counsel to sue. Counsel can no more sue for their fees when the solicitor has received the money than when he has not received it : see *Hobart* v. *Butler*. (3) The case of *Ex parte Colquhoun, In re Clift* (4) was then pressed upon us, and it was insisted that, unless a barrister had a legal right to recover his fees, this case could not be supported. In that case an application was made to the Court of Bankruptcy by a member of the Bar, that a trustee in bankruptcy of a solicitor might be ordered to pay to him the amount he had received in respect of the counsel's fees comprised in bills of costs which the trustee had collected and got in. In our opinion, the case, so far as decided by Cave J., was quite rightly decided, but it affords no justification for contending that a barrister has any legal claim to his fees, when the amount has been received by the solicitor. The principle upon which the Court proceeded was that clearly stated by James L.J. in *Ex parte James, In re Condon* (5), and frequently enforced subsequently in reported cases. The Court exercising administrative jurisdiction, and having control over its officers, will in proper cases order, and, if necessary, compel, them to make payments which are honest and just, although such payments may not be recoverable either at law or in equity as between litigant parties. In that case money which had been paid to a trustee in bankruptcy under a mistake of law was ordered to be refunded. James L.J. at p. 614 of the report said : " I am of opinion that a trustee in bankruptcy is an officer of the Court.

(1) (1862) 32 L. J. (C.P.) 137.
(2) [1896] 2 Ch. 487, 494.
(3) (1859) 9 I. C. L. R. 157.
(4) 38 W. R. 688.
(5) (1874) L. R. 9 Ch. 609.

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He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people." This was followed, and indeed extended, in *Ex parte Simmonds, In re Carnac.* (1) There money had been paid to a trustee in bankruptcy under a mistake of law, and had been applied by him in paying dividends to creditors; it had been paid away, but the Court ordered him to repay the amount out of other moneys coming to his hands, and applicable to the payment of dividends to the creditors. Lord Esher M.R., after referring to the fact that money had been paid by a mistake of law, said at p. 312: "The question is, what ought the Court to do when the mistake is discovered? When I find that a proposition has been laid down by a Court of Equity or by the Court of Bankruptcy which strikes me as a good, a righteous, and a wholesome one, I eagerly desire to adopt it." Then he referred to *Ex parte James.* (2) "Such a proposition was laid down by James L.J. in *Ex parte James.* (2) A rule has been adopted by Courts of law for the purpose of putting an end to litigation, that, if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the Court has never intimated that it is a high-minded thing to keep money obtained in this way; the Court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order that is, to put an end to litigation. But James L.J. laid it down in *Ex parte James* (2), that, although the Court will not prevent a litigant party from acting in this way, it will not so act itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, namely, not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake

(1) (1885) 16 Q. B. D. 308. (2) L. R. 9 Ch. 609.

of law come into the hands of an officer of a Court of common law, the Court would order him to repay it as soon as the mistake was discovered." Then a little lower down he said: "A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the Court will order him to act in an honourable and high-minded way, and so it was laid down by James and Mellish L.JJ. in *Ex parte James*. (1) It is true that in that case the money in question had not been divided among the creditors, but was still in the hands of the trustee, and we are about to carry the principle of this decision somewhat further. But, though the money has been divided among the creditors, the Court sees that other moneys, which would be applicable to the payment of dividends to the creditors, are about to come into the hands of the trustee, and it has not been shewn that any injury will be done to any one by ordering the trustee to apply this money which is coming to him to replace the other money which was paid to him in error, and I think it is right that it should be so applied." Another case illustrating the same principle is *In re Brown, Dixon* v. *Brown*. (2) At p. 602 Kay J. said, with regard to money paid under a mistake in law, "If there was any mistake in law in so handing it over, I am supported by the decisions in bankruptcy, which have been cited, of *Ex parte James* (1) and *Ex parte Simmonds* (3), in saying that the Court of Bankruptcy would not allow the ordinary defence of mistake of law to prevail. The judges in those cases treat the assignee or the trustee in bankruptcy as being an officer of the Court, and lay down the rule that money paid to him in mistake of law must be repaid by him; and even if he has spent the actual money he will be ordered, according to the later of these decisions, to recoup the parties entitled to that money out of other of the bankrupt's assets coming to his hands afterwards. That, as James L.J. said in the earlier of those cases, is because the Court of Bankruptcy, in dealing with its own officers, thinks it right to be perfectly fair, and not to regard the technical rule, which is scarcely honest in some cases. Of course,

(1) L. R. 9 Ch. 609. (2) (1886) 32 Ch. D. 597.
(3) 16 Q. B. D. 308.

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I am not exercising the jurisdiction of the Court of Bankruptcy, but the question is submitted to this Court, and I have no doubt or hesitation in saying that a Court of the Chancery Division does not consider itself bound to act on principles less honest than the Court of Bankruptcy." For another illustration see *In re Tyler, Ex parte the Official Receiver* (1), where it was held by the Court of Appeal, Vaughan Williams, Farwell, and Buckley L.JJ., that the foregoing decisions to which we have referred are not limited to the particular case of money paid under a mistake of law, but decided as a general principle that which James L.J. at the end of his judgment in *Ex parte James* (2) laid down as the duty of the Court. In our opinion it is upon that principle that *Ex parte Colquhoun, In re Clift* (3) was decided. There the trustee in bankruptcy was ordered to pay to counsel the amount of fees he had received because it was honest and just that the payment should be made. It has nothing to do with any legal right of counsel to prove for fees. There is another case upon which we ought to say a word, that is the case of *In re H. & C. Hall* (4), which was with reference to the right of counsel to prove in bankruptcy for fees. In that case, the solicitor for the assignees of a bankrupt undertook to hand over in full to the counsel any fees which might come to the hands of the assignees. So far that was merely what the assignees would have been ordered to do by the Court, and is the same as *Ex parte Colquhoun, In re Clift.* (3) But in the same case Mr. Commissioner Fane held that as regards counsel's fees received by the bankrupt solicitors before their bankruptcy, and admitted by them to have been so received, counsel could prove for this sum as money had and received to his use. This case is very shortly reported, but in our opinion the decision cannot be supported upon the ground on which it appears to have been rested. No action for money had and received would have lain against the solicitors at the suit of counsel, and no proof upon that ground could be sustained. The decision can only be supported, if at all, on the principle of *Ex parte James* (2) that the estate of the bankrupt

(1) [1907] 1 K. B. 865.
(2) L. R. 9 Ch. 609.
(3) 38 W. R. 688.
(4) 2 Jur. (N.S.) 1076.

having been increased by the fees of counsel paid to and improperly retained by the solicitors, and this amount having been mixed with and become indistinguishable from the rest of the bankrupt's property, all that the Court can do by way of acting honestly is to order the trustee to pay to counsel a sum equal to the dividend on the amount so received, rateably with the other creditors, and as if he had a legal right of proof. With these observations, we leave that case where it was left by Lindley L.J. in *In re Le Brasseur and Oakley.* (1)

This appeal fails and must be dismissed. Under the circumstances there will be no order as to the costs of the appeal, except that leave is given to the garnishees to retain their costs out of any fees payable by them to the judgment debtor.

Appeal dismissed.

Solicitors: *Nicholson, Patterson & Freeland; Adkin & Sons, for Nye & Clewer, Brighton; Slaughter & May.*

G. A. S.

[IN THE COURT OF APPEAL.]

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[1912, Folio 454.]

Admiralty—Ship—Collision—Loss of Submarine—Loss of Life—Assessment of Damage—Alteration of Finding of Registrar and Merchants as to Amount only—Pensions and Grants to Relatives of Deceased Officers and Seamen.

In an action of damage by collision, brought by the plaintiffs, the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, against the defendants, the owners of a German steamship, the damages occasioned to the plaintiffs by reason of the collision between a submarine and the steamship were referred to the registrar assisted by merchants to assess the amount thereof on the basis of the defendants paying 95 per cent. of the assessed damages.

By the schedule to the assistant registrar's report the amount (item 1) claimed in respect of the "value of the hull, machinery, and electric fittings and batteries of the submarine at the time of her loss" was 35,000*l.*, of which 26,500*l.* was allowed. Under item 9 the sum claimed in respect of "capitalized amount of pensions and grants paid or payable by the plaintiffs to the relatives of the crew who were drowned" was 5140*l.* provisionally assessed at 4100*l.*, the whole of which was disallowed.

On motion by the defendants to vary the report in respect of item 1,

(1) [1896] 2 Ch. at p. 494.

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on the ground that the sum of 26,500*l.* was excessive, the President reduced the amount to 23,850*l.* On cross-motion by the plaintiffs to vary the report by allowing item 9 on the ground that the amount (4100*l.*) was recoverable at law, the President confirmed the report, holding that, apart from statute, damages could not be recovered for negligence causing the loss of human life. Both the plaintiffs and the defendants appealed:—

Held by the Court of Appeal (Buckley L.J., Kennedy L.J., and Scrutton J.) that, with regard to item 1, the sum of 26,500*l.* must stand, as it was arrived at by the assistant registrar and merchants upon evidence produced by both sides, and was varied by the President only upon the question of quantum; for an appellate tribunal does not review a figure so found unless under very exceptional circumstances, such as the detection of an error of principle, or an obvious mistake in the calculation, or a clear misunderstanding of evidence lying at the root of the assessment.

As to item 9, the Court held that the effect of the decisions in *Osborn* v. *Gillett* (1873) L. R. 8 Ex. 88; *Clark* v. *London General Omnibus Co.* [1906] 2 K. B. 648; and *Jackson* v. *Watson & Sons* [1909] 2 K. B. 193, was to render binding upon the Court of Appeal the ruling of Lord Ellenborough in *Baker* v. *Bolton* (1808) 1 Camp. 493, that "in a civil court, the death of a human being could not be complained of as an injury"; and the law, as to the damages not being recoverable, must be reviewed, if at all, in the House of Lords.

APPEAL by plaintiffs, the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, against a decision of the President (Sir Samuel Evans) reviewing a report of the registrar, assisted by merchants, assessing the damages in respect of the loss of H.M. submarine *B* 2 after collision with the steamship *Amerika*, owned by the defendants (respondents).

The case is reported on the questions of—

(1.) an appellate tribunal reviewing a finding of the registrar and merchants as to amount only, and

(2.) the disallowance of the capitalized amounts of pensions and grants paid or payable by the plaintiffs to the relatives of the seamen on submarine *B* 2 who were drowned.

On October 4, 1912, between 5 and 6 A.M., H.M. submarine *B* 2, of 316 tons displacement, 115 feet in length, and carrying a crew of sixteen hands all told, was in Dover Strait carrying out manœuvres between the South Goodwin lightship and Calais, and making about eleven knots, when she came into collision with the German twin screw steamship *Amerika*, of 22,621 tons gross

register, proceeding down the English Channel, bound from Cuxhaven to Southampton, Cherbourg, and New York with passengers and cargo, and manned by a crew of 596 hands all told.

As a result of the collision the submarine sank, and all on board of her, save one, were drowned. Measures were taken to search for the vessel, and she was examined by divers; but salvage operations were subsequently abandoned.

On October 24 a writ was issued by the Commissioners for executing the Office of Lord High Admiral against the owners of the steamship *Amerika*, and a statement of claim was delivered on November 26 charging those on board the *Amerika* with negligence, and claiming judgment against the defendants and their bail for the damage sustained. On December 3 the defence of the owners of the *Amerika* was delivered denying that the collision and damage stated in the statement of claim were caused by the negligent navigation of the *Amerika*, and alleging that the loss was solely caused by the negligence and bad navigation of H.M. submarine *B* 2; but, before the date fixed for the hearing, the defendants, by agreement dated December 10, admitted that their steamship the *Amerika* was alone to blame for the collision, and submitted to judgment being entered against them, agreeing to pay 95 per cent. of the plaintiffs' claim, to be referred to the registrar and merchants for assessment. The reference was held by the assistant registrar, assisted by two merchants, on July 18, 21, and 22, 1913, and, on July 28, the assistant registrar reported that, out of a claim of 41,050*l.*, a sum of 28,024*l.* had been allowed, with interest at 4 per cent. from the date of the collision.

The Court was moved by both the plaintiffs and the defendants to vary the report, and on December 18, 1913, the following judgment was delivered dealing with the items objected to:—

THE PRESIDENT (SIR SAMUEL EVANS). These are motions to vary the report of the assistant registrar upon an inquiry as to damages arising out of a collision between the steamship *Amerika* and the British submarine *B* 2.

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The collision took place in the early morning of October 4, 1912, some few miles off Dover. It was an appalling disaster, as it sank the submarine and caused the loss of the lives of all the officers and men, except one, a lieutenant, who was the sole survivor. (1)

The motions now before me are made by the plaintiffs and defendants to vary the report in respect of three items.

The defendants ask for variations in respect of items 1 and 2, and the plaintiffs in respect of item 9.

The items are:—

Item 1.—Value of the hull, machinery, and electric fittings and batteries of the *B* 2 at the time of her loss, which was claimed at 35,000*l.* and allowed at 26,500*l.*;

Item 2.—Expenses of searching for, finding and examining, the wreck, claimed at 1286*l.* 3*s.* 10*d.* and allowed as claimed; and—

Item 9.—Capitalized amount of pensions and grants paid or payable by the plaintiffs to the relatives of the crew who were drowned, claimed at 5140*l.* 18*s.* 6*d.* and totally disallowed.

As to items 1 and 2, no question of principle arises; the sole question is as to the amounts.

As to item 1, the assistant registrar reports as follows:—

"As to item 1, the plaintiffs relied upon the evidence of Mr. Webb, who estimated the value of the submarine at 35,000*l.*—the amount claimed. Her original cost was approximately 48,000*l.*, and his conclusion was arrived at by deducting from the original cost a percentage per annum under two separate heads; (1.) 'Depreciation of material,' and (2.) 'Degradation of type,' or, as it was sometimes called, 'obsoleteness,' but he declined to say how he apportioned the total percentage between 1 and 2, on the ground that it would or might be disclosing departmental

(1) The President added: "I may be permitted to say, in passing, that I had the pleasure early this year to meet casually on a sea voyage this courageous young lieutenant, who related to me some of his extraordinary experiences, and how he was saved from what he thought—not without serious grounds—would have been a certain death. He was then proceeding to the Far East for further submarine service in the Navy, undaunted and undeterred by the perilous calamity which destroyed the lives of all his comrades and so nearly deprived him of his own."

secrets if he did so. Evidence was also adduced on behalf of the defendants. On the whole of the evidence produced before us, we came to the conclusion that under the first head, depreciation would be at least as rapid in the case of a submarine as in the case of a merchant vessel, and that a very substantial further allowance for depreciation must be made under the second head. As regards the latter head, it is to be observed that the submarine *B* 2 was seven years old, she was one of the earliest type of submarine still in commission in the Navy, and, taking all the available evidence into consideration, we were of opinion that her period of useful service had not many more years to run. We came to the conclusion that the sum of 26,500*l.* fairly represents the value of *B* 2 at the time of her loss. This figure was arrived at by adding to the original cost 15 per cent. as representing the increased cost at the present day of labour and material, and deducting from the figure so arrived at 10 per cent. per annum under the two heads mentioned by Mr. Webb."

I am of opinion that, upon the evidence, and upon the conclusions stated by the assistant registrar to have been arrived at by him and the merchants, a sufficient deduction has not been made, and that the sum allowed should be reduced from 26,500*l.* to 23,850*l.*

As to item numbered 2, the only part of the 1286*l.* 3*s.* 10*d.* which was disputed by the defendants was a sum of about 840*l.* claimed and allowed for the use of some Admiralty tugs.

Upon the evidence, and having regard to the fact that the assistant registrar had the advantage of the assistance of experienced merchants as assessors, I see no reason why this sum should be altered, and, accordingly, the total amount of 1286*l.* 3*s.* 10*d.* allowed on item No. 2 will stand.

The only conflict upon a matter of principle arising between the parties is on item 9, and the principle in question is one of public interest and importance.

The claim was, as stated, for a sum of 5140*l.* 18*s.* 6*d.* said to represent the "capitalized amount of pensions and grants paid or payable by the plaintiffs to the relatives of the crew of the submarine who were drowned."

The assistant registrar disallowed the whole of this claim, on

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the ground that it was not recoverable in law, but, in case it should be held that the plaintiffs were entitled to recover something, he assessed the proper amount at 4100*l*.

It is essential at the outset to ascertain the exact position in which the plaintiffs (whom, for the sake of brevity, I shall now designate as "the Admiralty") stand with reference to these "pensions and grants," or, as they ought to be called, "pensions to widows and compassionate allowances to children or relatives." They are granted under statutory authority according to scales authorized by the Privy Council and prescribed by the King's Regulations. The King's Regulations produced to me as applicable were those of 1911.

Chapter LIII A. (at p. 496) contains various sections, some of which are as follows:—

Section I.—Widows of naval officers.

Section IV.—Children of officers, compassionate allowances.

Section V.—Mothers and sisters of officers.

Section VII.—Pensions, &c., to relatives of men killed on duty.

In these sections will be found, amongst others, these clauses:—

"Section I.—1974 A. Widows of officers of the Royal Navy, and of the Royal Marines, subject to the regulations contained in this chapter, may be allowed pensions, and their children compassionate allowances, at the rates specified in Appendix XVIII. A.

"1975 A. 1. The pensions authorised by these regulations cannot be claimed as a right. They are granted as rewards for good and faithful service rendered by deceased officers; they will only be conferred on persons deserving the public bounty; the ordinary pension will not be granted to widows whose private incomes exceed the confidential scale which may from time to time be fixed by the Admiralty as the limit for each rank of officer, and the pensions are liable to be discontinued altogether in case of any misconduct rendering the individuals receiving them unworthy of the public bounty.

"1982 A. The pensions of widows whose private incomes, after their pensions have been awarded, may increase beyond the limit fixed from time to time by the Admiralty for the rank last

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held by their husbands, shall be suspended so long as their private incomes exceed such limit, but may be restored again in the event of their private incomes decreasing within the limit.

"1984 A. In all cases of a widow remarrying, her pension shall be suspended from the date of her remarriage; but, in the event of her again becoming a widow, her pension may be restored upon proof being adduced to the Admiralty that her private income does not exceed the limit fixed from time to time by the Admiralty for the rank last held by her husband, and that she is otherwise deserving the public bounty, but it will be again liable to suspension during future remarriage.

"1985 A. If a widow should, in consequence of remarriage with a naval or marine officer, become again eligible for a pension from naval funds, she may either revert to her first pension, or be granted the pension for which her second marriage rendered her eligible, whichever is most to her advantage.

"Section IV. 1996 A. 1. Allowances on the compassionate list to the legitimate children of deceased commissioned officers and commissioned warrant officers may be given in those cases in which the rank of the officer would render his widow eligible to be placed on the pension list, provided it be shown that the children have no other allowance, pension, or provision, from the Government, except in the case of boys under the age of 18 who may be serving as subordinate officers in the Navy, and that their pecuniary circumstances and those of their family are so limited that they actually require assistance from the compassionate fund.

"2. The scale of compassionate allowances for children of officers is laid down in Appendix XVIII. A., but motherless children who are not in receipt of more than 30*l.* a year from other sources may be granted allowances within a maximum of double the ordinary rates.

"1997 A. All persons alluded to in Art. 1998 A, who are in receipt of 30*l.* a year from other sources, or whose mothers have been refused pensions on account of private income, are considered ineligible for compassionate allowances in ordinary circumstances. In the case of motherless children, however, the private income limit is 45*l.*

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"1998 A. 1. The allowances granted to the sons of officers may be continued until they attain the age of 18, or are otherwise previously provided for; and those to the daughters may be continued until they marry or attain the age of 21, whichever shall first happen, and no longer, except in very special cases in which, if it shall be shown that sons or daughters are afflicted with any mental or bodily infirmity rendering them incapable of making any exertion for their own support, and that they are still in distressed circumstances, the allowances may be continued, or revived should any break of continuity have occurred.

"2. These allowances may also be awarded in those special cases where the sons and daughters of officers, who were not in receipt of allowances when under age, are rendered incapable of making adequate exertion for their own support through infirmity dating from a period before the father's death, and before the sons or daughters reached the age at which, in ordinary circumstances, compassionate allowances would cease.

"2011 A. Under the second section of Act 46 & 47 Vict. c. 32, pensions and allowances are granted by the Admiralty out of the funds of Greenwich Hospital to widows and children of:—(*a*) Non-commissioned officers and petty officers and men of the Royal Navy and marines killed or drowned in the service of the Crown, or on lifeboat service.

"5. If a widow re-marry, her pension will cease, and she will be eligible to receive a gratuity equal to one year's pension in full discharge of all claims upon the public bounty. Allowances to children may be continued.

"6. Pensions and allowances are tenable subject to good behaviour, and are granted at the discretion of the Admiralty. They cannot be claimed as a right. Any assignment, sale, or contract relating to a pension or allowance is void.

13. "Widows of petty officers and seamen of the Royal Navy and non-commissioned officers and privates of the Royal Marines specified in clauses 1 and 2, at the discretion of the Admiralty, may be allowed a gratuity equal to one year's full pay according to the rating of their late husbands at the time of death, exclusive of any badges or other extra or additional pay, in lieu

of the pensions to which they might be eligible under these regulations.

"2012 A. In the event of men specified in clauses 1 and 2 of Article 2011 A. not leaving widows or children, but leaving parents or other relatives dependent upon them, gratuities not exceeding one year's full wages may be given at the discretion of the Admiralty to such parents or relatives, provided the total expenditure in such gratuities shall not exceed in any one year the sum of 500*l.*"

The whole of the regulations can, of course, be referred to, but the above portions have been set out in order to exhibit the character of the pensions and allowances which may be awarded.

A list of pensions and allowances awarded by the Admiralty after the deaths of the officers and men killed on the submarine was produced before the assistant registrar, and a copy of it was shewn to me.

It can be shortly summarized. It shews that pensions were paid or payable to widows of officers and seamen for varying amounts, and that allowances were paid or payable to their children for varying amounts for periods of years varying from nine to sixteen years. One of such children was born after his father's death. It also shews that "lump sum allowances" for varying sums were given to fathers and mothers of some of the deceased.

Many questions arise as to whether the capitalized sums of such pensions and allowances can be recovered at law by the Admiralty against the defendants as part of the damages caused by the collision, e.g.:—

1. Can the Admiralty recover any damages alleged to have been sustained by the Admiralty which were caused by, or which resulted from, the death of the deceased persons?

2. Can the Admiralty recover as damages any sums which could not be claimed against them by representatives or relatives of the deceased legally as of right, but which they pay gratuitously and in their discretion?

3. Are the capitalized amounts of the pensions and allowances damages which flow from the defendants' negligence in such a way as to render them recoverable in law?

The answers to these questions, or some of them, will render it

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unnecessary to decide other minor questions which were raised as to the proceedings being in rem, or as to the payments already made by defendants to some representatives of the deceased under Lord Campbell's Act, and so forth.

It was contended for the defendants that none of these pensions or allowances, or the capitalized sums said to represent them, could be recovered by the Admiralty, on the ground that the claim was made in respect of the death of human beings, there being no statutory authority giving the plaintiffs any right of action in such a case.

The ruling of Lord Ellenborough in *Baker* v. *Bolton* (1) was relied upon in support of this contention. That ruling was that: "In a civil court, the death of a human being could not be complained of as an injury," i.e., as a legal or actionable injury. Unfavourable comments have been made upon this ruling, but after the decisions in *Osborn* v. *Gillett* (2), *The Vera Cruz* (3), *Clark* v. *London General Omnibus Co.* (4), and *Jackson* v. *Watson* (5), that ruling, in its application to actions of tort, cannot be questioned, unless and until those decisions are reviewed and reversed by the final judicial tribunal of the country. That rule of law has been adopted as part of the common law by the Supreme Court of the United States—whose decisions are treated with the greatest respect by our Courts—in *The Harrisburg* (6), and in the Supreme Court of the Dominion of Canada in *Monaghan* v. *Horn.* (7)

The Harrisburg (6) was a case of a suit in admiralty. The authorities upon the subject up to that time in America, and in this country, were there fully dealt with, and the decision of the Supreme Court of the United States was that "In the absence of any statute giving the right, a suit in admiralty" (which was dealt with on the same principles as an action at common law), "cannot be maintained in the Courts of the United States to recover damages for the death of a human being on the high seas, or in waters navigable from the sea, which is caused by negligence."

(1) (1808) 1 Camp. 493.
(2) (1873) L. R. 8 Ex. 88.
(3) (1884) 9 P. D. 96; 10 App. Cas. 59.
(4) [1906] 2 K. B. 648.
(5) [1909] 2 K. B. 193.
(6) (1886) 119 U. S. (12 Davis) 199.
(7) (1882) 7 Can. S. C. R. 409.

In the case of *Jackson* v. *Watson* (1) this ruling was encroached upon, where the cause of action was under a contract, and where the action was in contract, the death being treated only as an element in the damages, but by that very decision the validity of the rule of law in cases of tort for negligence was emphasized. Vaughan Williams L.J., in the concluding sentence of his judgment, says that the rule "only applies to cases where the cause of action is the wrong that caused the death, and does not apply to cases where there is a cause of action independently of such wrong."

The Attorney-General relied upon the passage in Vaughan Williams L.J.'s judgment at the foot of p. 201 as shewing that there is a difference between the cases where the death of a human being is part of the cause of action, and the cases where the death is only an element in the damages, and argued that the deaths in the case now before the Court only constituted an element in the damages.

But the death of the officers and men of the submarine is not only part of the cause of action, but is the cause of action upon which the Admiralty must rely to found their claim for damages in respect of the pensions and allowances which they are paying or may pay. In an action for breach of contract, although there is no actual loss, a plaintiff is entitled to some damages, if only nominal. But, as is pointed out by Farwell L.J. in *Jackson* v. *Watson* (1), "In an action in tort for negligence the damages are of the essence of the action; negligence per se gives no cause of action, the cause of action arises when the negligent act has resulted in damage to the plaintiff." Bowen L.J. states the law concisely in *The Vera Cruz* (2): "The killing of the deceased per se gives no right of action at all, either at law or under Lord Campbell's Act."

The Attorney-General put forward in his argument in the present case, but not with much emphasis or elaboration, that the cause of action accruing to the Admiralty as plaintiffs was the negligence in striking the submarine, and not in directly causing the deaths of the deceased.

But upon the present head of damages, the negligence alleged

(1) [1909] 2 K. B. 193. (2) 9 P. D. 96, at p. 101.

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is, and must be, causing the death of deceased, and thereby inflicting damage upon the Admiralty by reason of the death. It makes no difference that the tort also caused other injury to the plaintiffs by the destruction of their property and otherwise.

The case is the same as if the Admiralty claimed only these damages in the action. It might have happened that by reason of the negligent navigation of the *Amerika* officers or seamen on the submarine might have been killed without the submarine itself being touched, e.g., by their being struck by the bowsprit or some other projecting part of the steamer.

The cause of action must be the negligence (whatever form it may take) plus the death, and where negligence causes death no one, except under some statute, like Lord Campbell's Act, suffers an actionable wrong by the death.

In the case of some of the deceased, their relatives no doubt could, if within the category specified in Lord Campbell's Act, have brought actions against the defendants. Some of such relatives made claims against the defendants which the defendants discharged. But it may very well have been that there were other relatives not within the category who may have suffered loss by the deaths, and it is clear they would have no right of action. Moreover, other persons entirely unconnected with the submarine, but connected by contract or otherwise with the deceased persons, might shew a pecuniary loss through their death, but they would be devoid of any legal remedy.

There was an action in this Court a few years ago in which the facts were in some respects similar to those in the present case, namely, *The Circe*. (1) There the plaintiffs had paid sums to representatives of seamen who were killed in a collision which they were compelled to pay by Spanish law, and they claimed to include them in their damages against the owners of the delinquent vessel. The decision is not an authority upon the question now raised, but there are certain passages in the judgment of the President, Sir Gorell Barnes, which may be referred to. At p. 8 he said:—

"The class of claim which apparently has been paid by

(1) [1906] P. 1.

the owners of the Spanish ship is not a class of claim which could be made or recognized by English law. If the claim had been made against an English ship by the representatives of persons drowned in consequence of a collision in which the ship they were on was concerned, and there was no fault on the part of that ship, then they would have no claim against the owners; but if there was fault for which the persons drowned were not individually responsible, still, according to the doctrine of common employment, their representatives would have no remedy against the owners of that ship. Therefore, the position of persons who could make a claim at all would be this—they could only make a claim against the owners of the vessel which came into collision with a vessel on which the parties drowned were. Now, if a claim could be made against the other vessel, it would be made by virtue of Lord Campbell's Act."

And at p. 13 he said:—

"If one, therefore, turns to the present claim, in the first place it is a claim which is not for damages in the true sense. It is merely a claim under a foreign statute by the owners of the ship, which appears to be made independently of any question of negligence. It appears to be made because by an Act, which is somewhat analogous to the Workmen's Compensation Act, certain obligations are imposed upon the owners of the ship, which obligations are independent, it seems to me, of the question whether there was any blame or not on the part of those in charge of that ship. Then, again, if one passed from that point and were to treat the claim as damages which could be recovered against any ship in fault, possibly they might make a claim out against their own ship, if the master was in fault, according to foreign law, and, perhaps, in this country, but then that would still not be a claim for damages such as could be made in the Admiralty Court, to which the division of loss rule applies."

But if the claim now being considered is a good one, the plaintiffs in *The Circe* (1) would have been entitled to recover as damages the sum they had paid, and no one in that case put the claim forward in this form.

(1) [1906] P. 1.

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I may observe that Sir Gorell Barnes, who decided *The Circe* (1), was also a party to the decision in the Court of Appeal of *Clark* v. *London General Omnibus Co.* (2)

Before leaving this branch of the case, I may call attention to the fact that if this were a case where an owner of a merchant ship has paid, and under compulsion of law in accordance with the Workmen's Compensation Act, 1906, compensation to dependants of seamen in his employ who were killed in a collision caused by negligence for which another ship was to blame, it seems to have been thought necessary by the Legislature to provide expressly, by s. 6 of the Act, that he should have a right over against the owners of the negligent ship in respect of the compensation so paid. In my judgment, according to our law as it now stands, the plaintiffs have no legal right to recover any of the damages which they claim, and which they allege they sustained by reason of the negligence of the defendants and the deaths of the deceased.

Upon the second main question there is no clear authority, and only one was cited, namely, *Dixon* v. *Bell.* (3)

The King's Regulations shew clearly that the pensions and allowances are not granted as of right, and could not be legally demanded. No doubt the Admiralty are in every sense, except the strictly legal sense, bound to pay, but still they have a wide discretion in various respects.

A private employer might be under an equally solemn promise to provide for widows or children of a faithful servant, but if the servant were killed by the tort of another, in my opinion the employer could not recover against the tortfeasor sums which he only paid or intended to pay gratuitously. The law does not permit a person to be generous at the expense of another.

In my judgment these pensions and allowances awarded by the Admiralty by express terms as of grace cannot in any event be claimed as damages against a third person.

As to the last main point, namely, whether, if any damages could be recovered in respect of the death of the deceased, the pensions, &c., and their capitalized sums are too remote, I will

(1) [1906] P. 1. (2) [1906] 2 K. B. 648.
(3) (1816) 1 Stark. 287.

only say a few words. I have dealt somewhat fully in a recent case (*H.M.S. London* (1)) with questions relating to remoteness of damage, and I will not repeat what I then said.

I have pointed out that there was no legal obligation upon the Admiralty to pay the pensions and allowances, but even if there was, in my opinion there would be a great difficulty in the way of the Admiralty recovering, because there was no duty owed by the defendants to them, with regard to any contract entered into by them with persons in their employ, which contract was entirely unconnected with the particular property of the plaintiffs which was injured by the defendants, and upon which the employees for the time being happened to be. What I mean by this is, the contract with the Admiralty was not a contract in respect of submarine *B* 2, because they could be transferred at any time from that vessel to some other vessel: see *Insurance Co.* v. *Brame* (2), and cf. *Cattle* v. *Stockton Waterworks Co.* (3)

Moreover, the King's Regulations shew in how many ways pensions and allowances might be suspended, reduced, forfeited, and so forth, and, having regard to that fact, I should hold, if it were necessary, that the damages are altogether too speculative and uncertain, and on this ground and on the ground that the payments depend upon separate arrangements, not contractual, made between the plaintiffs and other persons towards whom the defendants have no duty in respect of such arrangements, that the damages are in any event too remote to be recovered at law. I am of opinion, therefore, that the Admiralty have failed to make out this part of their claim.

[In the result the President allowed the defendants' objection to the assistant registrar's report so far as it related to item 1, and varied the report by reducing the amount allowed under that item from 26,500*l.* to 23,850*l.*; otherwise the learned judge confirmed the report, overruled the plaintiffs' objections, and condemned them in the costs thereof, as well as in the costs incurred by reason of the defendants' cross-motion.]

The plaintiffs appealed in respect of the finding of the Court as to items 1 and 9.

(1) [1914] P. 72.

(2) (1877) 95 U. S. (5 Otto) 754, at p. 758.

(3) (1875) L. R. 10 Q. B. 453.

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The Attorney-General (*Sir John Simon, K.C.*), *Laing, K.C.*, and *C. Robertson Dunlop*, for the appellants (plaintiffs), the Commissioners for executing the Office of Lord High Admiral.

Aspinall, K.C., *Bateson, K.C.*, and *Arthur Pritchard*, for the respondents (defendants), the owners of the steamship *Amerika*.

1914. May 18. *The Attorney-General* asked that item 1 might be dealt with separately, and urged that it was not in accordance with the practice of an appellate tribunal to vary the report of the registrar and merchants upon a mere question of quantum not involving any principle.

BUCKLEY L.J. Upon an inquiry as to the damages arising out of a collision between the Hamburg-American liner *Amerika* and the submarine *B* 2, the matter was referred to the assistant registrar, assisted by merchants, to report. The first item was the "value of the hull, machinery, and electric fittings and batteries of the *B* 2 at the time of her loss." In respect of that item the Crown claimed a sum of 35,000*l*. The matter was heard before the assistant registrar and merchants, with the result that the assistant registrar reported that the proper amount to be allowed was 26,500*l*.

The matter then came before the President of the Admiralty Division (Sir Samuel Evans), on a motion to vary that report, and upon this item he said: "As to item 1, no question of principle arises; the sole question is as to the amount. . . . . I am of opinion that upon the evidence, and upon the conclusions stated by the assistant registrar to have been arrived at by him and the merchants, a sufficient deduction has not been made, and that the sum allowed should be reduced from 26,500*l*. to 23,850*l*." The matter, therefore, is one in which, there being no question of principle, the learned President has reviewed the report and varied the report of the assistant registrar upon the mere question of quantum.

The Court refuses to interfere with quantum except in exceptional circumstances. More than one instance may be put. The first which occurs to my mind is in respect of salvage. The Court does not interfere unless the case is so strong that

the Court thinks a wrong sum has been arrived at as a matter of principle, or the award is so unfair, either to the salvor or the salved, that the conscience of the Court is shocked.

A second case is the taxation of costs, when there arises a question as to the proper sum to be allowed. The Court never interferes there in the absence of some question of principle. The present case is another instance. I do not propose to go into the details of the matter, because I do not think I ought to review them. There was evidence before the assistant registrar and merchants on the one side by Mr. Webb, who gave evidence for the Admiralty, and who in the public interest shewed reserve, to some extent, as to the principle upon which he arrived at his reduced figure. On the other side was evidence given by gentlemen experienced in this matter, who did go into figures. Upon that evidence it was for the assistant registrar assisted by the merchants to determine, to the best of his ability, what was the proper figure. Whether 6 per cent. depreciation on the original value or 6 per cent. upon the diminishing value was taken, or what rate was allowed for degradation of type, I do not inquire. It was for the registrar assisted by the merchants to consider, and unless it is shewn that some question of principle is involved, or that the sum allowed is so grossly too large or so grossly too small, as that it ought to be reviewed—in which case, no doubt, it would be competent for the Court to review it, assisted again by assessors in the matter—the Court, I apprehend, ought not to interfere. If this were a salvage case no Court would think of interfering between 26,500*l.* and 23,850*l.* Upon similar principles I think the Court should refuse to interfere as to a question of damages. The appeal must be allowed and the original figure restored.

KENNEDY L.J. I am of the same opinion. In this case the question of the assessment of damages was referred to the registrar and merchants. They had before them evidence, and a considerable body of evidence. They had before them Mr. Webb, on behalf of the Admiralty, who gave results in figures shewing what in his judgment ought to be the sum at which the

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assessment should be fixed. They had before them a quantity of skilled evidence on behalf of the *Amerika* shewing a different figure. It is quite true Mr. Webb's evidence was evidence which was necessarily qualified by a proper reserve in regard to the disclosure of the basis of his figure. The registrar and merchants had before them, however, the results of that evidence and they had before them the evidence of the other side. They did not accept the evidence of either side, but came to a figure to the best of their calculation for the assessment. The merchants, of course, in this particular case, had to consider materials of a nature which was not the nature of the materials of an ordinary ship, but on the other hand they are certainly more qualified than the ordinary layman to form what I may call a business view in regard to the assessment of figures connected with the life of ships, and of the material of a ship which contains a great deal of valuable machinery.

The learned President of the Admiralty Division has taken a figure different from the assistant registrar—a lower figure—and in so doing, of course, says that he has looked at the evidence and at the conclusions arrived at by the assistant registrar and merchants, but then does not give any reason why he differed from their conclusions, as he did to the extent of the difference between 26,500*l.* and 23,850*l.* He gives no reasons for the difference, and we have noopportunity, therefore, of considering whether there was any particular sort of mistake, in his opinion, made in the calculation of the tribunal below. I apprehend that in a general way the assessment of damages takes place before a specially constituted tribunal, and I may add a tribunal so constituted as to include both skilled and legal elements—the element of skill in business and mercantile affairs, as well as a trained lawyer with special admiralty knowledge. The Court above ought not, therefore, except in very exceptional circumstances, to interfere with the decision of the assessing tribunal unless some error in principle is pointed out or there is an obvious error in the calculations regarding figures, or a plain misunderstanding of some material portion of the evidence before the assessing tribunal. I can think of no other reason upon which the Court above ought to interfere with the assessment,

and it is not suggested here that there is any error in principle, or error in calculation, or plain misunderstanding of evidence, which lay at the root of the assessment to which the learned assistant registrar and his assessors came. In the absence of any reason given by the learned President it seems to me our plain duty is to restore the judgment of the assessing tribunal.

SCRUTTON J. concurred.

As to the disallowed item No. 9, the *Attorney-General* on behalf of the Admiralty contended that the claim by the Admiralty to compensate the widows and orphans was reasonable and good in law, the payment of pensions being part of the damages flowing naturally from the negligence of the defendants, even though it was, as against the Crown, an act of grace, and the claim could be made in an admiralty action in rem because s. 5 of the Maritime Conventions Act, 1911, expressly conferred jurisdiction in cases of loss of life or personal injury. It was admitted that the dependants of the deceased seamen had already recovered compensation under Lord Campbell's Act from the defendants, the owners of the *Amerika*.

All the cases cited by counsel for the appellants are mentioned in the judgments, and the arguments, and cases material to the issue referred to, on behalf of the respondents, are also to be found therein. (1)

Cur. adv. vult.

May 27. BUCKLEY L.J. The question is whether the Lords of the Admiralty can recover against the *Amerika*, as forming part of their damages for negligence by the latter in collision, the capitalized amount of pensions and grants paid or payable by the Admiralty to the relatives of the crew who were drowned.

Lord Ellenborough's ruling in *Baker* v. *Bolton* (2) that "in a

(1) In the course of the argument Kennedy L.J. pointed out that by the Roman law no liability for compensation was imposed in case a freeman was killed: "*quia in homine libero nulla corporis aestimatio fieri potest*": Dig. ix. 3. 1 § 5. See Grueber's Lex Aquilia, p. 17.—T. L. M.

(2) 1 Camp. 493.

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civil Court the death of a human being could not be complained of as an injury" must, notwithstanding the great weight of Baron Bramwell's minority judgment in *Osborn* v. *Gillett* (1), be regarded as binding upon us. It has been so treated in previous decisions in this Court. In *Clark* v. *London General Omnibus Co.* (2) the Court of Appeal approved *Osborn* v. *Gillett* (1), and in *Jackson* v. *Watson & Sons* (3) treated *Osborn* v. *Gillett* (1) and *Clark* v. *London General Omnibus Co.* (2) as governing them, "so that it is not open to us, even if we thought the ruling [in *Baker* v. *Bolton* (4)] wrong, to differ from it." (5) It is true that in *Clark* v. *London General Omnibus Co.* (2) the appeal was only from so much of the judgment as directed judgment for the plaintiff for the funeral expenses, and it is true that some different considerations arise in the case of liability incurred for funeral expenses consequent upon the death from those that are relevant in the case of benefit lost or damage sustained by reason of the death. Sir Gorell Barnes called attention to this by an interlocutory observation at [1906] 2 K. B. 652. But the Court gave judgment upon the views expressed upon the one side and the other by the learned judges in *Osborn* v. *Gillett* (1), and upheld the view of the majority as against the minority judgment of Baron Bramwell. *Clark* v. *London General Omnibus Co.* (2), although not strictly a decision upon anything other than the funeral expenses, was the considered judgment of the Court of Appeal, and we must follow it. In *Jackson* v. *Watson & Sons* (3) the Court of Appeal have already expressed themselves to be bound by it. The last-mentioned case is the stronger because the Court in an action for breach of contract there found themselves at liberty to hold that where the death was not an essential part of the cause of action, but only an element in ascertaining the damages, there was no rule of law which rendered the damages irrecoverable, and in so doing expressly distinguished the case in which the action is in tort, holding that in an action of tort the fact would have been no ground for letting in the damages.

(1) L. R. 8 Ex. 88.
(2) [1906] 2 K. B. 648.
(3) [1909] 2 K. B. 193.
(4) 1 Camp. 493.
(5) [1909] 2 K. B. at p. 198.

In this Court we are, I think, bound by authority to say that even if the appellants have suffered pecuniary damage flowing from the deaths occasioned by the negligence of the respondents, that damage is not recoverable, for the deaths of the men by drowning "cannot in a civil Court be complained of as an injury." "The killing of the deceased per se gives no right of action": per Bowen L.J. in *The Vera Cruz.* (1)

Sir Frederick Pollock, in his Law of Torts (9th ed. pp. 65, 66), while advancing cogent reasons for attacking Lord Ellenborough's ruling, concludes with a hope that, while the question is not open in the Court of Appeal, the House of Lords may some day consider it with greater freedom, and Beven on Negligence (3rd ed. vol. i., p. 182) treats the matter as set at rest by the decision in *Clark* v. *London General Omnibus Co.* (2) These text-books of repute, therefore, take the view which I take, namely, that we, sitting here, are bound to hold that the damages are not recoverable, and that the law must be reviewed, if at all, in the House of Lords.

A second question argued was whether, inasmuch as the payments to the surviving dependants of the deceased are not legally demandable, the Crown can recover payments made not in satisfaction of liability. Upon this question I express no opinion. I think it inexpedient to express an opinion upon a point which does not arise for decision.

The appeal as to item 9 must be dismissed. The appeal as to item 1 has been already allowed. There should, I think, be no costs of the appeal.

KENNEDY L.J. In this case we have already expressed the judgment of this Court, allowing the plaintiffs' appeal in regard to item 1 of the report, and have stated our reasons for differing from the learned President of the Probate, Divorce, and Admiralty Division and restoring the finding of 26,500*l.* as it appears in the report.

The other questions argued before us relate to item 9, which the registrar and merchants provisionally assessed at 4100*l.* if on principle the plaintiffs were entitled to claim anything at all,

(1) 9 P. D. 96, at p. 101. (2) [1906] 2 K. B. 648.

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which both the registrar and the learned President have held they were not.

The plaintiffs' right to recover in respect of this item depends upon the decision of two points: First, Does the death by drowning of officers and seamen on board the submarine *B* 2 caused by the negligent navigation of the *Amerika* constitute a ground of claim enforceable by the Admiralty in the present action against the owners of the *Amerika*, if it is shewn that pecuniary loss has been occasioned to the Admiralty thereby? Secondly, is the pecuniary loss which consists in payments made, or to be made, by the Admiralty to relatives of the deceased officers and seamen in accordance with the King's Regulations under the head of "Pensions to widows and compassionate allowances to children or relatives," but not legally enforceable by those persons, a head of damage which the law will recognize? If the first of these two questions must be answered in the negative, the consideration of the second becomes unnecessary.

In regard to that first question, I am of opinion that this Court is bound by the authority of previous judgments in this Court—which are cited by the learned President in his judgment in the present case and which, therefore, it is quite unnecessary to particularize here—to give an answer in the negative. I think that Sir Frederick Pollock correctly states the conclusion that the Court of Appeal has declared the question not open. "One can only," adds the learned author of the Law of Torts (9th ed., p. 67), "indulge a faint hope that it may be more freely considered some day by the House of Lords." I will only add, in regard to this particular case before us, that I do not see how the position of the plaintiffs in regard to this head of claim can be rightly treated as strengthened by the fact that the negligence of the navigation of the *Amerika* injured at the same time the property of the plaintiffs by the sinking of the submarine itself.

If the view I have stated as to the first question be the true view, it becomes, as I have said, unnecessary for this Court to pronounce decisively upon that which I have set forth as the second question; but we have heard very full and careful arguments in regard to it, and speaking for myself, I am, after

considering these arguments, obliged to come to the conclusion that sums of money which are paid, as these pensions and compassionate allowances are, gratuitously and in the discretion of the person paying, could not rightly be held to constitute a head of damage recoverable from the negligent defendant. They do not, I think, come within the ambit of damages claimable in an action of tort, wherein a party liable for a breach of some duty imposed upon him, in the language of Collins M.R. (1), "probably, and in some cases certainly, comes under a somewhat larger liability than would be the case if it were a breach of contract, but still the liability is measured by what are the reasonable and probable consequences of his breach of duty."

In my judgment the decision of the learned President in regard to item 9 ought to be affirmed.

SCRUTTON J. This is an appeal by the Lords of the Admiralty, as owners of the submarine *B* 2, which was sunk by the negligence of those on board the steamship *Amerika*, against a decision of the President, affirming a decision of the assistant registrar, that the Admiralty were not entitled to recover as part of their damages the capitalized value of certain pensions and allowances which they paid to the widows and children of the officers and crew lost on the submarine. These latter had also been directly paid damages by the owners of the *Amerika* on their claims under Lord Campbell's Act.

The regulations under which the Admiralty paid these allowances are set out in the judgment of the President, and it was admitted by the Attorney-General that the payments were a matter of grace, and not made under any legal liability, though it was expected in the Navy that, as a matter of grace, such payments should be made.

The first reason for the disallowal of this item of damages was that it was the common law of England that no civil claim for damages could be brought for the death of a human being. Why this should be so, if the matter were open to us to consider, is a matter of great doubt; but I think it is determined by authority

(1) *Dunham* v. *Clare* [1902] 2 K. B. 292, at p. 296.

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binding us in the Court of Appeal that the common law of England is so. The majority of the Court of Exchequer so decided in 1873, in *Osborn* v. *Gillett* (1), following a decision of Lord Ellenborough's in *Baker* v. *Bolton* (2) in 1808. The Court of Appeal in *Clark* v. *London General Omnibus Co.* (3), in 1906, a case of tort, approved the reasoning of the majority in *Osborn* v. *Gillett.* (1) The Court of Appeal again in *Jackson* v. *Watson & Sons* (4), in 1909, a case of contract, recognized the same principle in cases of tort, where the cause of action is the wrong which caused the death, while holding the principle not to apply to cases of contract where there is a cause of action independent of such damage or death.

I understood the Attorney-General to admit that if the dead man, while on the submarine, had been struck by the bowsprit of a yacht, without damage to the submarine, the Admiralty could not have recovered the pension, though paid, as damages, because no property of theirs had been injured, but only an act done which imposed a liability on them under a contract, or honourable engagement. On this the language of Lord Penzance in *Simpson* v. *Thomson* (5) justifies the view of the Attorney-General; but the Attorney-General said that the *Amerika* tortiously damaged the property of the Admiralty, the submarine, and that the death and payment were the natural result of this damage. This point must have arisen every time a man was killed, not by a direct blow, but by collision with his carriage in which he was riding; but it has never been considered sufficient to found a claim at common law. Considering, as I do, that this Court is bound by the decisions I have referred to, I abstain from referring to the numerous arguments and difficulties which require consideration in a Court which can review the authorities from the beginning. This ground of objection, so far as this Court is concerned, prevents the Admiralty from recovering this item of damage.

It becomes unnecessary, therefore, finally to determine the other objection, namely, that as these pensions are paid as of

(1) L. R. 8 Ex. 88.
(2) 1 Camp. 493.
(3) [1906] 2 K. B. 648.
(4) [1909] 2 K. B. 193.
(5) (1877) 3 App. Cas. 279, at p. 289.

grace, not under legal obligation, they are not recoverable as damages. I am disposed to think that a payment which a plaintiff need not legally make or continue to make is too remote to be treated as a recoverable consequence of a tort. It follows not from a legal obligation to pay, but from the determination of the plaintiff to pay as an act of grace. Voluntary subscriptions to hospitals are never claimed or recovered in accident cases. It is said that medical expenses and expenses of holidays in accident cases need not legally be incurred, but are recovered. These appear to me to follow as consequences of the legal obligation to minimize damages, if you claim them ; and the resort to medical skill or a holiday to repair damage and restore health is a legal duty to minimize the damage the plaintiff claims though its expense must be borne by the wrong-doer. But I regard the point as of some difficulty, and do not think it necessary to express a final opinion on it.

Appeal, as to item 1, *allowed, as to item* 9, *dismissed. No costs.*

Solicitor for the appellants (plaintiffs), the Commissioners for executing the Office of Lord High Admiral: *The Treasury Solicitor.*

Solicitors for the respondents (defendants), the owners of the steamship *Amerika: Pritchard & Sons.*

T. L. M.

1914
April 7;
July 6.

In the Estate of MARY HEYS, Deceased. WALKER and Another *v.* GASKILL and Others.

[1913 W. 1627.]

Probate—Mutual Wills—Joint Tenancy of Leasehold Property—Severance—Will revocable—Subsequent Will pronounced for.

A husband and wife, joint tenants of leasehold properties, executed mutual wills in 1907, the clear arrangement between them being that those wills were to be irrevocable.

The husband died in 1911, and his will was proved.

In 1912 the wife executed a codicil to her will, and, in 1913, she executed a fresh will. These later documents were executed by the wife in breach of a definite arrangement between herself and her husband in 1907 when their mutual wills were executed:—

Held, that the agreement or arrangement between the husband and wife to execute the mutual wills, and the execution of those wills, severed the joint tenancy in the properties in question and created a tenancy in common.

In the Goods of Joseph Raine (1858) 1 Sw. & Tr. 144 disapproved and not followed.

Held, further, that the will of 1907 was revocable, and that the will of 1913 should prevail as the true last will of the deceased (widow).

The plaintiffs, as executors, propounded the last will, dated January 22, 1913, of Mary Heys, widow, who died on May 10, 1913.

The defendants were a number of persons interested under an earlier will, dated October 10, 1907, which they alleged was one of two mutual wills then executed by the deceased and her husband. The husband died on October 20, 1911, and his will was duly proved, and the said Mary Heys received benefits thereunder. The material facts are stated by the learned President in his judgments.

Le Bas, for some of the defendants (minors). It is clear that the wills of October 10, 1907, were mutual wills. There was ample consideration and no attempt to alter either of them in the lifetime of the deceased's husband.

As to whether the leaseholds are the joint property of the

husband and wife, it is difficult to find a case more on all fours with this than *In re Wilford's Estate, Taylor* v. *Taylor*. (1) The irrevocability of mutual wills is considered in the judgment in *Stone* v. *Hoskins* (2), and the earlier authorities are there cited.

Then the only other thing is to ask for a declaration as claimed alternatively in the defendants' pleading, namely, "If the (said) alleged codicil dated the 5th September, 1912, or the (said) alleged will dated the 22nd January, 1913, is admitted to probate, a declaration that the plaintiffs or one of them are trustees or a trustee for these defendants to the extent of the benefits given to them under the will of the deceased dated the 10th October, 1907, and as such hold the property of the deceased in trust for these defendants."

W. O. Willis, for the other defendants, did not desire to add anything.

R. M. Middleton, for the plaintiffs. The last will ought to stand.

These mutual wills are and have been treated as contracts: *Hobson* v. *Blackburn and Blackburn* (3); *Gould* v. *Kemp*. (4) In certain instances a will would be, or might be, a severance of a joint tenancy: *In re Wilford's Estate, Taylor* v. *Taylor* (1); Hargrave's Juridical Arguments. (5) As to enforcing a contract or promises to make wills, see *Fortescue* v. *Hennah* (6), where a covenant to make a will was held good, the consideration being marriage; and in *Robinson* v. *Ommanney* (7) there was also consideration for a covenant not to reform a will. Those cases and the case of *Lord Walpole* v. *Lord Orford* (8) shew that the Court will go into the matter of consideration.

[SIR SAMUEL EVANS, PRESIDENT, referred to *In the Goods of Letitia Lovegrove* (9), which appeared to be a case of a joint will.]

In one of the cases there cited, namely, *In the Goods of Joseph Raine* (10), also a case of a joint will, Sir C. Cresswell gave a

(1) (1879) 11 Ch. D. 267.
(2) [1905] P. 194, at p. 196.
(3) (1822) 1 Add. 274.
(4) (1834) 2 My. & K. 304.
(5) Vol. ii., p. 304.
(6) (1812) 19 Ves. 67.
(7) (1883) 23 Ch. D. 285.
(8) (1797) 3 Ves. 402.
(9) (1862) 2 Sw. & Tr. 453.
(10) 1 Sw. & Tr. 144, at p. 146.

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definition of a mutual will. It is submitted that the present case is just outside that definition.

Le Bas in reply. This Court has all the powers of a judge of the Chancery Division under the Judicature Acts. [*In the Goods of Tharp, Tharp* v. *Macdonald* (1) and *In the Goods of Marchant* (2) were also referred to.]

April 7. SIR SAMUEL EVANS, PRESIDENT. I will at once give my decision on the facts and reserve my decision on the law.

The plaintiffs are the executors appointed under the will of January 22, 1913; the defendants are various people who are interested in establishing the validity of an earlier will of October 10, 1907.

Mary Heys was the widow of Joseph Heys. These two people lived happily and the wife had assisted her husband in saving money. Most of this money was invested in leasehold property, the leases of which were taken by the husband and wife as joint tenants, so that if nothing was done to sever the joint tenancy the whole of the properties would be taken by the survivor.

These two people called in Mr. Coup and gave instructions for the preparation of the two wills dated October 10, 1907.

In these two wills the whole of the property is dealt with without reference to ownership. The wills are both exactly the same, his in favour of her, and hers in favour of him, with gifts over to their respective relatives.

By the execution of the wills it is said there was a severance of the joint tenancy. My impression is there was, but I will look into that matter too.

I am satisfied on the evidence of Mr. Coup that there was a clear arrangement between the husband and wife that those wills were to be irrevocable if nothing happened in the lifetime of either and I find that nothing did happen.

In this case the deceased got the codicil of 1912 prepared and Mr. Coup explains the circumstances under which it was prepared, and his explanation is a perfectly natural one.

The deceased made this codicil and a subsequent will.

I find as to this codicil and the subsequent will that they were

(1) (1878) 3 P. D. 76. (2) [1893] P 254.

made in breach of a definite arrangement come to between her and her husband, when the wills were made in October, 1907.

July 6. SIR SAMUEL EVANS, PRESIDENT. The facts established in this case were stated by me at the conclusion of the evidence.

There are three testamentary documents executed by the deceased to be referred to: a will of October 10, 1907, a codicil of September 5, 1912, and a will of January 22, 1913. All these were duly executed and attested.

The plaintiffs as executors propound the will of 1913 as the last will and testament of the deceased. The defendants in various capacities ask the Court to pronounce against the will and the codicil of 1912, and in favour of the will of 1907 as the true last will of the deceased, on the ground that it became irrevocable at the death of the deceased's husband, but in the alternative they claim a declaration that the plaintiffs are trustees for the defendants to the extent of the benefits given to them under the will of 1907, and as such hold the property of the deceased in trust for the defendants.

The facts are that on the same date, namely, October 10, 1907, Joseph Heys, the husband of the deceased testatrix, and she, his wife, executed separate wills with the same provisions, mutatis mutandis. The first provision in the husband's will was a devise and bequest of all his estate to his wife absolutely for her own use and benefit if she survived him; but if she predeceased him certain other provisions therein set out were to have effect. Similarly, the first provision in the wife's will was a devise and bequest of all her estate to her husband absolutely for his own use and benefit, if he survived her, but, if he predeceased her, other provisions similar to those already referred to therein set out were to have effect. Practically the whole of the estate at the time of the execution of the wills consisted of house property which the husband and wife held as joint tenants, and which was acquired in the manner described in my statement of the facts. I am of opinion that the agreement or arrangement made between the husband and wife to execute the two wills, and the execution thereof, severed the joint tenancy, and created a tenancy in

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common: *In re Wilford's Estate, Taylor* v. *Taylor* (1); *Gould* v. *Kemp.* (2)

The husband died on October 20, 1911. Neither his will, nor that of his wife, had at that time been revoked. After the husband's death, his wife executed the codicil, and finally her will of 1913.

The two wills of 1907 have been called "mutual wills"; and it was contended that, by the contract or arrangement between the husband and wife, the wife's will of 1907 became irrevocable at the death of the husband, and remained irrevocable thereafter.

Apparently a mutual will, in the strict sense of the word, is a will executed by two or more people, or what is more accurately called a joint will: *Denyssen* v. *Mostert.* (3) Such was the will which existed in the case of *Dufour* v. *Pereira* (4) and in the case of *Hobson* v. *Blackburn and Blackburn.* (5)

The term "mutual wills" has been used, and may conveniently be used, to describe documents of a testamentary character made as the result of some agreement or arrangement between husband and wife, or other persons; but under our law this Court as a Court of Probate knows nothing of what are so described as "mutual wills." (For an interesting case where the history of what is commonly called "a mutual will," made by a husband and wife, in accordance with the Roman-Dutch law prevailing in the Cape of Good Hope, is traced and expounded, see *Denyssen* v. *Mostert.* (6)) The function of this Court as a Court of Probate is to ascertain and pronounce what is the last will, or what are the testamentary documents constituting the last will, of a testator, which is or are entitled to be admitted to probate.

In this case, upon the death of the husband, his will of October 10, 1907, could be proved by the executors. If the case of *In the Goods of Joseph Raine* (7) contains any decision to the contrary, I am of opinion that that is no longer the law. On probate of the husband's will, the deceased

(1) 11 Ch. D. 267.
(2) 2 My. & K. 304, at p. 309.
(3) (1872) L. R. 4 P. C. 236, at p. 258.
(4) (1769) 1 Dick. 419 (and see Hargrave's Juridical Arguments, vol. ii., p. 304).
(5) 1 Add. 274.
(6) L. R. 4 P. C. 236.
(7) 1 Sw. & Tr. 144.

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testatrix would by its terms be entitled absolutely to the whole estate.

As to the contention that, upon the death of the husband, the will of the wife (the present testatrix) of the same date, October 10, 1907, became irrevocable, I am of opinion that it lacks any foundation.

A will in this country is by its very nature and in its very essence a revocable instrument. It is revocable either by law, as in the case of a subsequent marriage, or by the act of the testator. "If a man make his testament and last will irrevocably, yet he may revoke it; for his acts or his words cannot alter the judgment of the law, to make that irrevocable which, of its own nature, is revocable": *Vynior's Case.*(1) So Swinburn, in treating of cases where express clauses derogatory of the power of making future testaments are found, lays down that such testaments are avoided by testaments of a later date, precisely as if they contained no such derogatory clauses, and states the reason as follows: "The reason is, because the clause derogatory of the power of making testaments is utterly void in law; nor can a man renounce the power or liberty of making testaments; neither is there any cautel under heaven to prevent this liberty, which also endureth whilst any life endureth." (2)

And in our standard work of the present day, Williams on Executors (3), it is stated, unequivocally and without any limitation, that "It is also a peculiar property in a will, ... that by its nature it is in all cases a revocable instrument, even should it in terms be made irrevocable . . . ."

In 1822 the case of *Hobson* v. *Blackburn and Blackburn* (4) came before Sir John Nicholl, an eminent judge in the Ecclesiastical Probate Court of that day. In that case an allegation propounding a joint will as against a separate will of one testator of a later date was made; and Sir John Nicholl rejected the allegation in a short and pithy judgment, which is as follows (5):—

"I have no hesitation whatever in rejecting the allegation,

(1) (1610) 8 Rep. 82a.
(2) (1611) Swin., pt. vii., s. 14.
(3) 10th ed. at p. 7.
(4) 1 Add. 274.
(5) Ibid. at p. 277.

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propounding the mutual, or conjoint, will, as that of the party deceased in this cause, on the principle, that an instrument of this nature is unknown to the *testamentary* law of this country; or, in other words, that it is unknown, *as a will*, to the law of this country at all. It *may*, for aught that I know, be valid *as a compact*—it *may* be operative, in equity, to the extent of making the devisees of the will trustees for performing the deceased's part of the compact. But these are considerations wholly foreign to this Court, which looks to the instrument entitled to probate as the deceased's *will*, and to that only. The allegation plainly proceeds upon a notion of the *irrevocability* of the instrument which it propounds as the *will* of the deceased. Why this very circumstance destroys its essence *as a will*, and converts it into a *contract*; a species of instrument over which this Court has no jurisdiction. Upon these broad, and, as I apprehend, sufficiently intelligible grounds, I reject this allegation."

The case of *Dufour* v. *Pereira* (1) was cited and relied on by the defendants' counsel. That was a case before Lord Camden in the Court of Chancery. It was referred to and not dissented from in a case before Lord Loughborough, *Lord Walpole* v. *Lord Orford* (2), and also in a case before Sir Gorell Barnes P., *Stone* v. *Hoskins*. (3) From the judgment of Lord Loughborough in *Lord Walpole* v. *Lord Orford* (4) it will be seen that "The bill stated an agreement in writing contained in an instrument conceived in the form of a will . . . . The bill prayed performance; and in consequence of the agreement it was contended, that all the effects, that existed, were specifically bound; and it prayed a transfer of the specific stocks, that were the subject of it, and not disposed of, according to that mutual agreement."

And, from the report in 1 Dickens, it appears that the judgment was that the wife having proved the joint will after her husband's death, and having possessed all his personal estate and enjoyed the interest thereof during her life, had by those acts bound her assets to make good all her bequests in the joint will; and the necessary accounts were ordered to be taken.

(1) 1 Dick. 419.
(2) 3 Ves. 402.
(3) [1905] P. 194.
(4) 3 Ves. at p. 416.

The case is more fully reported in vol. ii. of Hargrave's Juridical Arguments (p. 272). At p. 309 the following passages occur: "Though a will is always revocable, and the last must always be the testator's will; yet a man may so bind his assets by agreement, that his will shall be a trustee for the performance of his agreement. Or suppose he makes his will, and covenants not to revoke it. These cases are common; and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This Court does not set aside the will, but makes the devisee heir or executor trustee to perform the contract."

The case put forward before me by the defendants is one based upon a contract which may give rise to certain trusts and remedies. As before stated, on the will of the husband, Joseph Heys, being proved after his death during the lifetime of his surviving wife, she acquired a complete legal title to all his estate. She might have disposed of it in law, although remedies might have been pursued against her for damages. There is no doubt but that damages can be recovered for breach of covenant not to revoke a will: *Robinson* v. *Ommanney* (1) and *In re Parkin, Hill* v. *Schwarz.* (2) In passing I may observe that it appears from the former case, and from the case of *In re Wilford's Estate, Taylor* v. *Taylor* (3), that no question of the irrevocability of the last wills was ever raised.

If the wife had not revoked her "mutual will" of 1907 by the later will, but had married, that in itself would have caused a revocation of her will. I am clearly of opinion that the deceased's will of 1907 was revocable. I must therefore pronounce in favour of the will of January 22, 1913, as the true last will of the deceased testatrix, Mary Heys.

But, in the event of my pronouncing in favour of the deceased's will of 1907 and admitting it to probate, I was asked, in the alternative, to make a declaration that the plaintiffs are trustees for the defendants to the extent of the benefits given to them under the deceased's will of October 10, 1907, and as such hold the property of the deceased in trust for the defendants.

(1) 23 Ch. D. 285. (2) [1892] 3 Ch. 510.
(3) 11 Ch. D. 267.

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No doubt, theoretically, this Court, as a Court of one of the Divisions of the High Court of Justice, under the Judicature Acts can and ought to—but only where it can conveniently and properly do so—decide all matters in controversy in any action between the parties to the action: *In the Goods of Tharp, Tharp* v. *Macdonald.* (1)

But this Court is in practice a Court of Probate and not of construction. It should, generally speaking, only construe testamentary documents in so far as it is necessary to decide what testamentary documents should be admitted to probate.

But I am asked to advance from the region of testamentary dispositions into that of contracts and trusts, and to declare certain trusts upon the footing of contract. Contracts and trusts are beyond and outside my jurisdiction in probate matters. Even if I ventured to declare any trusts, they would have to be administered in the Chancery Division and not in this. If I presumed to pronounce upon any contract or to make a declaration upon any trusts, in this case, I am not satisfied that I have all the necessary parties before me, and I have no knowledge of the state of the assets. What I am asked to do appertains specially to proceedings of the character expressly assigned to the Chancery Division by s. 34 of the Judicature Act, 1873.

In my opinion I cannot accede to the prayer of the alternative claim of the defendants; and I must leave them to pursue their remedies in the other Division.

I therefore limit my judgment to a pronouncement in favour of the will of January 22, 1913, as the true last will of the deceased testatrix.

The costs of all parties to be paid out of the estate.

Solicitors for plaintiffs: *Ayrton, Biscoe & Co., for Alfred Grundy & Co., Manchester.*

Solicitors for some of the defendants: *Davenport, Cunliffe & Blake, for Richard Stott & Son, Rochdale.*

Solicitors for the other defendants: *White & Leonard, for Hartley & Sons, Rochdale.*

(1) 3 P. D. 76.

H. D. G.

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June 23;
July 9.

Restitution of Conjugal Rights—Non-compliance with Decree — Periodical Payments—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68)—*Principles governing Orders for Periodical Payments.*

An order for periodical payments under the Matrimonial Causes Act, 1884, is a personal order against the respondent and is to be enforced in the same manner as in the case of an order for permanent alimony made after a decree of judicial separation.

Such periodical payments are made by analogy to alimony, to depend upon the means of the parties, and the Court has power, under s. 4 of that Act, to vary or modify any order for such periodical payments, or to suspend temporarily and to revive the order either wholly or in part, as the Court may deem just.

Notwithstanding the time limited by the Court for restitution of conjugal rights, the parties may at any moment resume cohabitation, and, in the event of any such resumption, an order for periodical payments previously obtained ought thereupon to be terminated or suspended.

The Legislature did not contemplate that periodical payments ordered to be made under the Act of 1884 should be more permanent or fixed, or should extend for a longer period, than the alimony obtainable if the further relief provided for by the Act, namely, judicial separation, were obtained.

The fact that the Court is empowered by the Act of 1884 to order periodical payments thereunder to be secured does not alter the character of the order or of the payments; the security being only for "such periodical payments," that is to say, payments expressly made variable and alterable by s. 4 of the Act.

This was a motion to confirm the registrar's report as to periodical payments under the Matrimonial Causes Act, 1884, s. 2.

The parties were married on September 24, 1889.

On November 25, 1913, the petitioner (wife) obtained a decree for restitution of conjugal rights against the respondent, which was not complied with by the respondent.

On December 29, 1913, the petitioner filed a petition for periodical payments, and the subsequent pleadings were filed.

The petition was heard before the registrar, who in due course filed his report.

By his report the registrar found the respondent's income to

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be 3059*l.* and the petitioner's 386*l.*, and on those figures found that the petitioner was entitled to 762*l.* out of the respondent's income.

The recommendations of the registrar are set out in the judgment of the learned President.

Barnard, K.C. (*Bayford* with him), for the petitioner, moved to confirm the registrar's report as to periodical payments. There is no question of quantum; the only question is whether the registrar had power to recommend that the periodical payments should be made during the petitioner's life, or whether he ought to have recommended that they should be made only during the joint lives of the petitioner and respondent. It is a question of the petitioner's rights under s. 2 of the Matrimonial Causes Act, 1884 (1), which created a new allowance for a wife (petitioner) after a decree for restitution of conjugal rights.

[SIR SAMUEL EVANS, PRESIDENT. Sect. 4 (2) may have a bearing on it. As at present advised I think s. 4 applies both in the case of an order to pay and an order to secure.]

Sect. 4 only applies where there is an order to pay and does not apply where there is an order to secure.

(1) 47 & 48 Vict. c. 68. Sect. 2, is as follows: "From and after the passing of this Act, a decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the Court may, at the time of making such a decree, or at any time afterwards, order that in the event of such decree not being complied with within any time in that behalf limited by the Court, the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation. The Court may, if it shall think fit, order that the husband shall, to the satisfaction of the Court, secure to the wife such periodical payment, and for that purpose may refer it to any one of the conveyancing counsel of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties."

(2) Sect. 4 of the Matrimonial Causes Act, 1884, is as follows: "The Court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same order wholly or in part, as the Court may think just."

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Where the Legislature intended to give the Court power to make an order to affect only the joint lives of the petitioner and respondent, it said so in express terms: Matrimonial Causes Act, 1866. (1)

The Court has an absolute discretion to order a permanent allowance in such a case as this to be paid either for the life of the petitioner or for the joint lives of the petitioner and respondent. [He referred to *Theobald* v. *Theobald* (2) and *Clutterbuck* v. *Clutterbuck*. (3)]

Duke, *K.C.* (*T. Bucknill* with him), for the respondent, referred to *Clutterbuck* v. *Clutterbuck* (3), *Campbell* v. *Campbell* (4), and *MacMahon* v. *MacMahon*. (5)

[Sir Samuel Evans, President. The husband is not bound to maintain his wife after his death. I could order security for a period as well as for life.]

It is submitted that upon the construction of the sections in the Matrimonial Causes Act, 1884 (6), the matter is clear. An order made under s. 2 of that Act is a personal order, and would not continue beyond the life of the respondent. When examined, that section disposes of the contention that there is power to order such an allowance for the petitioner's life. Sect. 17 of the Matrimonial Causes Act, 1857 (7),

(1) 29 & 30 Vict. c. 32. Sect. 1. is as follows: "In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit."

(2) (1889) 15 P. D. 26.

(3) (1913) 108 L. T. Rep. 573.

(4) Unreported (May 25, 1914: Bargrave Deane J.).

(5) Unreported (Nov. 6, 1913: Sir Samuel Evans, President).

(6) 47 & 48 Vict. c. 68.

(7) 20 & 21 Vict. c. 85, s. 17, is as follows: "Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife, by petition to the Court, ... according to the rules and regulations which shall be made under the authority of this Act; and the Court to which such petition is addressed, on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the

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deals with suits for restitution, and that section is subject to s. 22. (1)

That it was treated as a personal order in the Ecclesiastical Courts is shewn in *Fitzer* v. *Fitzer and Stephens* (2), where Lord Hardwicke is reported as saying: " . . . . their " (the spiritual Court's) " decrees for alimony and maintenance are only against the person of the husband, and do not affect any part of the estate so as to take it from the husband's creditors."

[SIR SAMUEL EVANS, PRESIDENT. An order for maintenance under s. 32 of the Matrimonial Causes Act, 1857 (3), could be for the petitioner's (wife's) own life, because the section says so. Where is the repeal of that section ?]

Barnard, K.C. By s. 2 of the Matrimonial Causes Act, 1907. (4)

Duke, K.C. (continuing). Under s. 1 of the Matrimonial Causes Act, 1866 (5), an order for monthly or weekly payments during

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same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly, and where the application is by the wife may make any order for alimony which shall be deemed just: . . . . "

(1) 20 & 21 Vict. c. 85, s. 22, is as follows: " In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

(2) (1742) 2 Atk. 511, per Lord Hardwicke, at p. 513.

(3) 20 & 21 Vict. c. 85, s. 32, was in the following terms:—" The Court may, if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage the Court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise to the wife, as it would have in a suit instituted for judicial separation."

(4) 7 Edw. 7, c. 12.

(5) 29 & 30 Vict. c. 32.

the joint lives of the petitioner and respondent could be made. Those provisions related to cases where the marital relationship had been extinguished, namely, in the case of a decree of divorce or nullity.

There has been no case where, after a decree of restitution or judicial separation, an order for payment during the life of the petitioner has been made; and the presumption to be drawn from that fact is that there is no power to make such an order.

[SIR SAMUEL EVANS, PRESIDENT. Ought I to take the decision of Butt J. in *Theobald* v. *Theobald* (1) as an authority?]

No; it was relied upon by both parties in *Clutterbuck* v. *Clutterbuck*. (2)

[SIR SAMUEL EVANS, PRESIDENT. It may be that I shall follow the decision of Bargrave Deane J. in *Clutterbuck* v. *Clutterbuck* (2) whether I agree with it or not.]

The form of the statute, the previous practice of the Court, and the subsequent practice of the Court support the contention that a limitation ought to be inserted in the order, and that the provision should be only during the joint lives of the petitioner and the respondent.

Barnard, K.C., in reply. Sect. 17 of the Matrimonial Causes Act, 1857 (3), dealt with suits for judicial separation and restitution of conjugal rights. Before the Matrimonial Causes Act, 1884 (4), was passed, the only means of enforcing a decree for restitution of conjugal rights was by attachment, and the absence of cases under that Act is accounted for because nearly every suit for restitution of conjugal rights is a step for obtaining a divorce.

[SIR SAMUEL EVANS, PRESIDENT. Alimony can be secured.]

It is submitted that it cannot.

[SIR SAMUEL EVANS, PRESIDENT. What about s. 1, sub-s. 1, of the Matrimonial Causes Act, 1907? (5) It is referred to as

(1) 15 P. D. 26.
(2) 108 L. T. Rep. 573.
(3) 20 & 21 Vict. c. 85.
(4) 47 & 48 Vict. c. 68.
(5) 7 Edw. 7, c. 12, s. 1, sub-s. 1, is as follows: "The Court may, if it thinks fit, on any decree for dissolution or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as having regard to her fortune (if any),

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"alimony" in the marginal note to that section, and also in the marginal note to s. 32 of the Matrimonial Causes Act, 1857.]

By the terms of those sections, allowances to wives after divorce were being dealt with.

The words in the Matrimonial Causes Act, 1884 (1), are wider than those in the Matrimonial Causes Act, 1857 (2), and give an absolute discretion as to whether the payments are to be for the petitioner's life or for the joint lives of the petitioner and respondent.

Duke, K.C. If there is a discretion to order the payment either for the petitioner's life or for the joint lives of the petitioner and respondent, what the registrar has submitted in his report would not be objected to.

Cur. adv. vult.

July 9. SIR SAMUEL EVANS, PRESIDENT. The petitioner, having obtained a decree for restitution of conjugal rights against her husband, made application under s. 2 of the Matrimonial Causes Act, 1884, for an order upon the respondent to make such periodical payments to her as to the Court might seem just.

The matter was dealt with in the usual course by one of the registrars, who has made his report upon the joint means or income of the wife and husband, and who in his report has submitted to the Court as follows :—

1. That the respondent be ordered to make the petitioner periodical payments to the amount of 760*l.* a year.

2. That one-third of the preference and ordinary shares in Tangye's, Limited, be charged with the payment of the said amount to the petitioner for her life.

3. That one-third of his interest under his father's will to

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to the ability of the husband, and to the conduct of the parties, it may deem reasonable, and for that purpose may refer the matter to any one of the conveyancing counsel of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties, and the Court may, if it thinks fit, suspend the pronouncing of its decree until such deed shall have been duly executed."

(1) 47 & 48 Vict. c. 68.

(2) 20 & 21 Vict. c. 85.

come into possession after the death of his mother be secured for the benefit of the petitioner for her life.

4. That the said payments be secured by a deed to be agreed between the parties or settled by the conveyancing counsel of the Court.

Upon the application to the Court to confirm the report and submission of the registrar, the respondent raised a point of importance as to the meaning of s. 2 of the Act, and the powers of the Court thereunder.

If the report was confirmed, the periodical payments ordered would be for the life of the petitioner. The respondent contends that they could not be ordered for a term exceeding the joint lives of the petitioner and the respondent.

The main object of the Act of 1884 was to put an end to the difficulties and absurdities of enforcing decrees for restitution of conjugal rights by attachment, and in lieu of that remedy to punish disobedience to the decree by creating a statutory desertion which would enable a petitioner at once—without waiting for a desertion for two years—to obtain a sentence and decree of judicial separation; and if adultery could also be established, a decree of dissolution of marriage.

The matrimonial offence of denying conjugal rights is the same. In addition to these main provisions, the statute contains other incidental provisions as to periodical payments and other matters.

Looking at the words of the section it seems clear that the order to make periodical payments is one made personally against the respondent. The order is to be enforced in the same manner as an order for alimony in a suit for judicial separation. It can only be enforced against the respondent personally by execution or by a debtor's summons. In *Linton* v. *Linton* (1) Bowen L.J. said: "It appears to me that arrears of alimony are, within the meaning of s. 5 of the Debtors Act, 1869, 'a debt due in pursuance of an order or judgment of a competent Court.' Before that, the payment of alimony was enforced by proceedings for attachment under the provisions of s. 52 of the Act 20 & 21 Vict. c. 85. Since the Debtors Act was passed the

(1) (1885) 15 Q. B. D. 239, at p. 246.

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proceeding by attachment has fallen into disuse, and, unless the payment of alimony can be enforced under s. 5 of the Debtors Act, there seems to be no way of enforcing it." The Lord Justice was dealing with a case where obviously the respondent had no goods or property which could be reached by the ordinary forms of execution. It may be noticed, in passing, that in the same case Lord Esher, dealing with s. 1 of the Matrimonial Causes Act, 1866 (1), hereinafter referred to, says: "Under this Act the Court is not empowered to enforce the payment of a lump sum by the husband, but only the making of monthly or weekly payments to the wife, and there is power to diminish the amount of the payments in case the husband's circumstances alter, and he becomes less able to pay, ... The power is given in consideration of the husband's ability to pay irrespectively of his having any realized property, and it is a power to make him pay out of his earnings by means of his own personal exertions. That shews what this kind of alimony was intended to be by the Legislature."

Alimony in a suit for judicial separation is never ordered for the life of a petitioner. Alimony is allowed in accordance with the practice of the Ecclesiastical Courts, and is regulated from time to time according to the means of the husband and wife. The Court may alter it by increasing or diminishing it or by taking it away whenever it pleases. The form of order for permanent alimony in cases of judicial separation is that the respondent "do out of his present income and until further order of the Court pay to the petitioner at and after the rate of" a certain sum per annum. The periodical payments provided for by the Matrimonial Causes Act, 1884, are made, analogously to alimony, to depend upon the means of the parties, because, by s. 4 of the Act, the Court has power from time to time to vary or modify any order for the periodical payment of money, either by altering the times of payment, or by increasing or diminishing the amount, or by temporarily suspending the same as to the whole or any part of the money ordered to be paid, or by reviving the order wholly or in part, as the Court may think just.

It is obvious that, notwithstanding the time limited by the Court

(1) 29 & 30 Vict. c. 32.

for the restitution of conjugal rights, the parties may at any moment resume cohabitation; and thereupon, equally obviously, the order for periodical payments ought to be terminated or suspended.

It will be observed that, if the petitioner, instead of resting upon the order for restitution, desired to proceed to obtain a decree for judicial separation under s. 5 of the Act, the only pecuniary relief which she could obtain would be an order for alimony subject to the power of the Court to alter, suspend, or end it, as hereinbefore stated. She could not obtain an order for payment of alimony for the term of her life.

I cannot think that the Act intended that the periodical payments during the disobedience of the order for restitution should be more fixed or permanent or extend for a longer term than the alimony obtainable if the further remedies towards judicial separation were pursued and the consequent relief obtained. It is true that if the Court thinks fit it can order the husband to secure to the wife the periodical payment, but this does not alter the character of the order or of the payment; the security would only be of "such periodical payment," namely, one which is expressly made variable, and alterable under s. 4.

I have made inquiries, and find that never during the thirty years since the passing of the Act has an order for periodical payments been made for the life of the petitioner, or for longer than the joint lives of husband and wife, except in the case of *Clutterbuck* v. *Clutterbuck* (1), hereinafter referred to.

Reference was made in argument to s. 32 of the Matrimonial Causes Act, 1857 (2), and to s. 1 of the Matrimonial Causes Act, 1866, which have been repealed and substantially re-enacted by s. 1 of the Matrimonial Causes Act, 1907. (3) These provisions stand upon their own footing, and are applicable only to cases of dissolution and nullity of marriage. This appears from the enactments themselves, and is made quite clear in the decided cases, to which I need not specifically refer. Any order to secure a gross or annual sum of money under sub-s. 1 of s. 1 of the 1907 Act, which is applicable when the marriage state is

(1) 108 L. T. Rep. 573. (2) 20 & 21 Vict. c. 85.
(3) 7 Edw. 7, c. 12.

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terminated by the decree of the Court, is unalterable, and it can be made for any term not exceeding the life of the petitioning wife.

But even in such cases, namely, dissolution or nullity, any order made under sub-s. 2 of the same section cannot be made for a longer period than the joint lives of husband and wife, and can be discharged, modified, suspended, revived, or increased, according to the circumstances from time to time. It was argued that because it was enacted in sub-s. 2 of s. 1 of this Act that the order should be "during the joint lives," the absence of such words from s. 2 of the 1884 Act shewed that the order could be for the life of the petitioner.

Such an argument is wholly inapplicable to a statute dealing with wholly different proceedings, and is hardly worth pursuing; but it may be pointed out that probably the words "during the joint lives" were inserted in dealing with an order for monthly or weekly payments in dissolution or nullity cases, in express contradistinction to the words "for a term not exceeding her life" which are to be found in the provision for orders to secure a gross sum or annual sum in the same cases.

I have said that in no case in practice, as far as I have been able to ascertain in the registry, has an order for periodical payment been made for the life of the petitioner, or for any term other than the joint lives of the petitioner and respondent, since the passing of the Act thirty years ago, except in the case of *Clutterbuck* v. *Clutterbuck*. (1) There are hardly any reported cases. In *Theobald* v. *Theobald* (2) Butt J. ordered the payments for the "joint lives." In the case of *MacMahon* v. *MacMahon* (3) (in which the registrar's report did not in terms specify the duration of the payments recommended) I ordered the payments for the joint lives; and in a case of *Campbell* v. *Campbell* (4) Bargrave Deane J. appears to have spoken as follows: "The Act of Parliament in these restitution cases only recognizes joint lives, not her life. The Court will allow it to be secured for the joint lives, because it is not like a divorce case."

(1) 108 L. T. Rep. 573.
(2) 15 P D. 26.
(3) Unreported (Nov. 6, 1913).
(4) Unreported (May 25, 1914).

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In this state of things, *Clutterbuck* v. *Clutterbuck* (1) need not be regarded as a binding authority on the point.

In my view, an order for periodical payments under s. 2 of the Act of 1884 cannot be made or secured for the life of the petitioner. It cannot operate for a period longer than the joint lives of the husband and wife, or until the Court otherwise orders.

I am of opinion that, according to the law and practice, the proper form of order for periodical payments in favour of the wife in cases of restitution is that the respondent do pay to her during the joint lives of herself and her husband, or until further order of this Court, the sum fixed, at the periods specified.

The third head of submission in the registrar's report is that "one-third of the husband's interest under his father's will to come into possession after the death of his mother be secured for the benefit of the petitioner for her life." This does not comply with the provisions of the section, and is not a proper order for periodical payments.

If and when the husband's reversionary interest under his father's will comes into possession and provides him with more capital or income, an application can be made for an increase of the amount under s. 4 of the Act. Such an application could also be made if the husband sold his reversionary interest (if he has the power to do so) before it fell into possession.

Upon the facts before me the report of the registrar must be varied by ordering:

(1.) That the respondent be ordered to make the petitioner periodical payments of 760*l.* a year for the joint lives of the petitioner and respondent, or until further order of this Court.

(2.) That the said payments be secured by a charge upon one-third of the respondent's preference and ordinary shares in Tangye's, Limited.

(3.) That it be referred to one of the conveyancing counsel of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties for the purpose of so securing the said payments.

(1) 108 L. T. Rep. 573.

1914

TANGYE v. TANGYE.

Counsel for the petitioner having said that the matter of the third of the respondent's reversionary interest might be dealt with by consent, liberty was given to apply as to that matter. Wife to have her costs.

Solicitors for the petitioner: *Lewis & Lewis.*
Solicitors for the respondent: *Hasties.*

H. D. G.

1914
Sept. 4.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(IN PRIZE.)

THE CHILE.

(No. 7.)

Prize Court—Jurisdiction of High Court—Supreme Court of Judicature Act, 1891 (54 & 55 *Vict. c.* 53), *s.* 4—*Outbreak of Hostilities—Hague Convention,* 1907, *No.* 6, *arts.* 1, 2—*Detention of German Vessel pending Further Order—Sufficiency of Affidavit of Shipowner.*

By art. 1 of the Hague Convention, 1907, No. 6, relative to the status of enemy merchant ships at the outbreak of hostilities, it is stated to be desirable that such a ship belonging to one of the belligerent powers in an enemy port should be allowed to depart within a reasonable number of days of grace, and by art. 2 if, owing to circumstances beyond her control, the merchant ship has been unable to leave the enemy port within that period, or has not been allowed to leave, the vessel may not be confiscated but merely detained.

A German vessel arrived at the East Bute Dock, Cardiff, on August 4, 1914, some hours before the outbreak of hostilities between Great Britain and Germany. She was, on the following day, detained by the Collector of Customs, and a writ was subsequently issued by the Procurator-General for her condemnation:—

Held by the President (Sir Samuel Evans), that the vessel was properly seized by the officers of the Crown, but in view of the difficulty of ascertaining whether any days of grace had been agreed upon by Germany, the vessel would, on the application of counsel for the Crown, be detained by the marshal until further order, with liberty to apply and all questions of costs reserved.

Held, further, that the affidavit filed by the agents of the owners was

insufficient in not setting out any grounds shewing a temporary suspension of the hostile character of the owners and entitling them to appear in the proceedings.

ON August 4, 1914, the German barque *Chile* (Danker, master), of 2182 tons gross, and of the port of Bremen, arrived in the East Bute Dock, Cardiff, light. On August 5 she was detained by the Collector of Customs at Cardiff in consequence of the declaration of war between Great Britain and Germany, which took effect some hours after the arrival of the ship on the previous day. On August 13 a writ was issued and served in an action instituted in the Prize Court by the Procurator-General against the owners and parties interested in the ship and cargo for the condemnation thereof; but it was subsequently ascertained that the vessel had no cargo, and the application now made on behalf of the Crown was for detention only under Order XXVIII., r. 1, of the Prize Court Rules. (1)

Sir John Simon, A.-G., who, with *Aspinall, K.C.*, and *G. W. Ricketts*, appeared for the Crown, drew the attention of the Court to the foundation and nature of the prize jurisdiction in the Court of Admiralty as explained by Lord Mansfield in the case of *Lindo* v. *Rodney* (2), and briefly referred to the eminent judges who had sat in the Prize Court, particularly Sir William Scott (Lord Stowell), who was appointed judge in 1798, and whose exercise of the jurisdiction in prize causes had earned for him universal admiration. The Attorney-General further pointed out that the judge of the High Court of Admiralty exercised by Royal warrant in time of war the office of judge of the Prize Court, which was treated as distinct from the ordinary Court, known as the Instance Court, the Prize Court hearing and determining according to the course of the Admiralty and the law of nations. As to any doubt which may have existed in respect of the position of the High Court in England in cases of

(1) Prize Court Rules, 1914.

Order XXVIII., r. 1: "Where it is held in a suit for condemnation that the ship is an enemy ship but in pursuance of some international convention or otherwise is only liable to detention and not to condemnation, the decree (Appendix A, Form 53, ii. and iv.) shall direct the marshal to retain the ship in his custody until further orders."

(2) (1782) 2 Doug 612, n.

1914

THE CHILE.

prize after the absorption of the Admiralty Court in the High Court, they were set at rest by s. 4 of the Judicature Act, 1891, by which the High Court in England was declared to be a Prize Court, and all causes and matters within the jurisdiction of the High Court as a Prize Court were assigned to the Probate, Divorce, and Admiralty Division.

In respect of the first case in the list before the Court, that of the *Chile*, the Attorney-General read the affidavit of the Collector of Customs setting out the facts, and also the following articles of the Conference held at the Hague in 1907, namely:—

Art. 1. "When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it.

"The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out."

Art. 2. "A merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated.

"The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."

The Attorney-General submitted that in the circumstances the Court should decree the detention of the vessel until further order, pending inquiries as to the reservations (if any) which the German Government had made to the articles in question of the Convention.

Bateson, K.C., and *C. R. Dunlop*, for the owners of the vessel.

[THE PRESIDENT (to Bateson, K.C.). Can you be heard?]

It is submitted that the terms of the Convention of 1909 contemplate the hearing of those to whom the writ is directed; and see *The Fenix* (otherwise *Phoenix*). (1) The affidavit of a

(1) (1854) Roscoe's English Prize Cases, vol. ii., p. 238, and also pp. 560—562.

member of the firm of Wendt & Co., agents of the owners, filed on behalf of the owners, in substance states that—

"1. The *Chile*, belonging to the port of Bremen, was lying in the port of Cardiff at the time war was declared between Great Britain and Germany, and before the said vessel could leave the said port of Cardiff she was seized and taken as prize.

"2. Restitution of the said vessel is claimed upon the ground that confiscation of the said vessel would cause injury to peaceful and unsuspecting commerce and would be contrary to the provisions of the Hague Convention No. 6, of the 18th of October, 1907.

"3. Alternatively and upon the grounds set out in paragraph 2 hereof it is claimed that the said vessel should be detained during the continuance of hostilities and should be released upon the termination thereof."

Lewis Noad, for the Cardiff Railway Company, in respect of dock dues and other charges, asked for liberty to apply before a final order was made by the Court.

1914. Sept. 4. SIR SAMUEL EVANS, PRESIDENT. I am sure we all deplore the causes which render it necessary for a Prize Court to sit again within these realms after the happy lapse of about sixty years, and, as you, Mr. Attorney-General, have said, in times past, and particularly during the latter part of the eighteenth century and the early part of the nineteenth century, the English Prize Courts pronounced judgments and gave decisions which commanded general confidence, and received the admiration of all countries interested in the law of nations. Our predecessors have set splendid examples and established high traditions, and the Prize Court of the present day, with the assistance of the Bar, will do its best—it cannot do more—to follow those examples and uphold those traditions.

The first case which comes before me is that of a vessel which was seized by the Custom House officers in the port of Cardiff. It is clear on the ship's papers that the ship was a merchant ship belonging to Germany, an enemy country, and it is clear also that by international law the Crown was entitled to seize

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The President.

this ship through the instrumentality of the officers of the Crown in the port of Cardiff although the ship was there before the commencement of hostilities. I therefore declare that this was an enemy ship, and that she was properly seized by the officers of the Crown, being droits of admiralty to which the Crown is by law entitled.

Several matters have been discussed in the course of this case in reference to what ought to be done having regard to the law of nations on the one hand, and to the Sixth Hague Convention of 1907. I propose to-day to make an order which will not finally determine the rights of the Crown in such a case. Various views may be entertained. It may be that the Crown is entitled to a judgment that the vessel be condemned and sold, or only to a judgment that the ship be detained. But the Crown is entitled, if it deems fit, to ask for less than the law could give; therefore I need not determine finally questions which may arise hereafter; and as the only order asked for at present is that the ship be detained, I can and do make that order. The writ in this case was issued by the Procurator-General in the form which is prescribed by the rules, and it has been duly advertised, and pursuant to the advertisement the clients of Mr. Bateson, who are agents for the shipowners, entered an appearance and have come here represented by counsel. I raised the point, as I was bound to do I think, as to whether Mr. Bateson's clients had a right to appear at all. It depends upon whether this is one of the special and exceptional cases in which an enemy subject has a right to appear in the Prize Court in this country. That matter I leave also undecided, acceding willingly to the request of the Attorney-General on that point. But I do decide for the purposes of to-day that the affidavit which has been filed here, and which must be filed before an appearance can be entered by an enemy subject, is wholly insufficient; it does not state even who the owners are; and it discloses no ground entitling them to appear. For that reason alone I strike out the appearance and the claim. Mr. Noad appears for the Dock Company at Cardiff applying for dues. I can make no order in his favour, but any order I make to-day will not interfere with any rights he may have, whatever his rights are, to recover his dues at law.

1914

THE CHILE.

The President.

I pronounce the said sailing ship *Chile* to have belonged at the time of seizure thereof to enemies of the Crown, and as such to have been lawfully seized by the officers of His Majesty's Customs at the port of Cardiff as good and lawful prize and as droits and perquisites of His Majesty in his office of admiralty; and upon the application of Mr. Attorney-General for the Crown, I order the said ship to be detained by the marshal until further order is issued by the Court. All questions of costs are reserved, and I give liberty to apply.

I will settle the form of the order before it is passed. (1)

Solicitor for the Crown: *The Treasury Solicitor.*

Solicitors for the owners of the *Chile*: *Stokes & Stokes.*

Solicitors for the Cardiff Railway Company: *Torr & Co., for Corbett, Chambers & Harris, Cardiff.*

(1) The order as settled by the President ran as follows:—

The President having struck out the appearance entered by Messrs. Stokes & Stokes on behalf of the owners of the sailing vessel *Chile*, and having considered the evidence, and having heard Mr. Attorney-General for the Crown, pronounced the said sailing ship *Chile* to have belonged at the time of seizure thereof to enemies of the Crown, and as such to have been lawfully seized by the officers of His Majesty's Customs at the port of Cardiff as good and lawful prize and as droits and perquisites of His Majesty in his office of admiralty; and thereupon, upon the application of Mr. Attorney-General for the Crown, ordered the said ship to be detained by the marshal until further order is issued by the Court. All questions of costs reserved. Liberty to apply.

T L. M

1914
Sept. 11, 16.

HIGH COURT OF JUSTICE

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY

(In Prize.)

THE MARIE GLAESER.

(No. 24.)

Prize Court—Neutral Rights under Enemy Flag—Status of Enemy Merchant Ships at Outbreak of Hostilities—Hague Convention, 1907, *No.* 6, *art.* 3—*Claims of Shareholders, Necessaries Men, and Mortgagees—Bounty of Crown.*

A vessel flying the German flag left her last port of departure some hours before the declaration of war between Great Britain and Germany, and was encountered and captured by a British cruiser on the high seas while still ignorant of the outbreak of hostilities:—

Held by the President (Sir Samuel Evans), that as Germany had not reciprocally accepted the terms of art. 3 of the Hague Convention, 1907, No. 6, the vessel could be condemned and sold by a British Prize Court and not merely conditionally detained.

The vessel at the time of her capture, though in the possession of her owners, a German limited liability company, was subject to a bona fide mortgage to a Dutch company domiciled at Dordrecht, and it was claimed that, as, according to German law, some kind of "property" in the vessel had passed to the mortgagees, the Crown should, out of the moneys realized by the sale of the vessel, apply such portion of it as would meet the mortgage:—

Held by the President, that upon the authorities, upon principle, and upon grounds of convenience and practice, the claim of the neutral mortgagees of the captured vessel must be rejected, and that the same conclusion would be arrived at if the claim were by British subjects; but the Crown being entitled to captured property could, out of its bounty, deal favourably with such claims.

Held, further, that the affidavit filed by agents on behalf of the German owners of the vessel was, as in the case of *The Chile* (ante, p. 212), insufficient to shew any right for enemy owners to put forward a claim, for it failed to indicate that the hostile character of the owners had been, in the circumstances, in any way suspended, and, therefore, the appearance of the German owners of the vessel would be struck out, and the appearances entered by separate shareholders would not avail them as they had taken shares in respect of a vessel with an alien flag; but as regarded neutrals and British subjects, it was open to the Crown

to exercise the prerogative of bounty, a prerogative which could also be applied to those who had appeared on the ground of having advanced money for necessaries, &c.

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THE MARIE GLAESER.

ON August 1, 1914, the German screw steamship *Marie Glaeser* (Albert Schroder, master), of 1317 gross and 812 tons net register, of the port of Rostock, owned by a limited liability company of Rostock, left Bristol for Archangel in ballast. On August 4 she put into Barry for bunker coal, and left the same day at 1 P.M., the declaration of war between Great Britain and Germany taking effect at 11 P.M. on that day. On August 5, about 4 P.M., she was captured at sea by H.M.S. *Gibraltar*, and the master (a German) of the *Marie Glaeser* was informed that war had broken out between Great Britain and Germany. A prize crew having been put on board, the vessel proceeded to Glasgow, arriving there on August 6, when the ship's papers were handed over to the collector of customs, and on August 17 a writ was issued and served in an action instituted in the Prize Court by the Procurator-General against the owners and parties interested in the ship *Marie Glaeser*, seized and taken as prize, and for the condemnation thereof.

Appearances were entered on behalf of (1.) the German steamship limited liability company owning the vessel; (2.) separate shareholders in the ship, Fry & Co., Glaeser, and Cennynck; (3.) De Eerste Nederlandsche Sheepsverband Maatschappij, of Dordrecht, in the kingdom of Holland, mortgagees; (4.) a firm of Harper, Seed & Co., of Newcastle, claiming for disbursements, and another firm of H. G. Harper & Co. (represented by one Petersen, the agent of the owners of the vessel), claiming for brokerage and necessaries, and A. Lutze & Co., also claiming for necessaries.

The case is reported on the question of the non-application, in the circumstances, of art. 3 of the Hague Convention, 1907, relative to the status of enemy merchant ships at the outbreak of hostilities (1), and as to the rights (if any) of British, neutral,

(1) Hague Convention, 1907 (Blue Book, Miscellaneous, No. 6, 1908, p. 70), art. 3: "Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities may not

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or enemy, mortgagees, of the *Marie Glaeser* as against the captor.

Sir Stanley Buckmaster, S.-G., and *G. W. Ricketts*, for the Crown.

Lewis Noad, for owners, including British shareholders, and others claiming for necessaries, disbursements, and brokerage.

Leslie Scott, K.C., and *L. F. C. Darby*, for the mortgagees.

All the material facts, together with the arguments of counsel and the cases referred to by them, fully appear from the following judgments delivered by:—

1914. Sept. 11. SIR SAMUEL EVANS, PRESIDENT. This vessel, the *Marie Glaeser*, was clearly, according to the ship's papers, a German vessel under a German master with a German crew, flying the German flag, and she was captured at sea on August 5, that is to say after hostilities had broken out. The declaration of war between this country and Germany took effect as from 11 P.M. on August 4. The vessel had left Barry some hours previously, and it is admitted that at the time of the capture the master was not aware that hostilities had broken out between Germany and this country. The question of whether and how far the provisions of the sixth Hague Convention of 1907 are binding upon this Court is one which has been left undecided up till now, but which will have to be decided in some case, I have no doubt, in the near future. But it is not necessary to have regard to the Convention of 1907 at all with reference to this particular case, because the circumstances are similar to those described in art. 3 of the sixth Convention. To that article Germany did not agree; she made a reservation in respect of it; and therefore she would not in any event be entitled to any benefit which might accrue from the terms and the conditions

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be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers.

"After touching at a port in their own country or at a neutral port, such ships are subject to the laws and customs of naval war."

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THE MARIE GLAESER.

The President.

laid down by that article. This vessel accordingly is a fit subject for condemnation, and I decree the condemnation of the vessel, and order the vessel to be appraised and sold by the marshal of the Court.

Now various claimants have appeared here, and I will take them in the order in which their cases have been put before the Court. In the first place, an appearance has been entered at the request of a gentleman who says he acts as agent for the owners of the vessel. Now it is admitted that the owners of the vessel are German subjects. The affidavit in this case partakes of the same character as the affidavit in the case of *The Chile* (1), that is to say it is wholly insufficient as it does not shew or tend to shew any special circumstances which would entitle the enemy owner of the ship to appear in this Court. According to Order III., r. 5, of the Prize Court Rules, 1914, before an appearance can be entered an alien enemy must file in the registry an affidavit stating the grounds of his claim. That does not mean merely that he must file an affidavit stating the contentions which he will lay before the Court, but it must be an affidavit stating that notwithstanding the fact that he is in ordinary circumstances an alien enemy, yet there are special circumstances which he can set forth entitling him to enter an appearance and be heard in this Court. A reference was made when this subject-matter was before the Court on the last occasion to some authorities upon the point, and I will deal with them very shortly now. In the case of *The Panaja Drapaniotisa* (2), Dr. Lushington in his reserved judgment said: "The principle is this: that to support a claim in the Prize Court the individual asserting his claim must first shew that he is entitled to a locus standi. No person to whom the character of enemy attaches can have such claim, save by the express authority of the Crown; therefore, to prevent deception, which might arise from the use of ambiguous terms, and to stop claims which might be preferred in one sense by the subjects of friendly or neutral States resident in the enemy's country and carrying on a trade there, it has always been deemed necessary that the claimant should describe, both affirmatively and negatively, the character in which he claims." Certain forms of

(1) Ante, p. 212. (2) (1856) 2 Eng. P. C. 560.

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THE MARIE GLAESER.

The President.

affidavit which were then in use are set out in the judgment in that case, and, though those forms of affidavit are no longer in use in this country, the affidavits which lead to the filing or the entering of an appearance in prize cases in this Court ought substantially to conform to the substance of the affidavits which were in vogue in 1856. They ought to state clearly what the position of the owner of the vessel is, what his nationality is, and if it appears that he is an alien enemy in the ordinary course, the circumstances ought to be stated in the affidavit shewing upon what grounds he claims to be standing in some character other than that of an alien enemy for the purpose of being heard in this Court. In the case of *The Felicity* (1), reported originally in 2 Dodson at p. 381, Lord Stowell says this : "In the present case it is contended that the hostile character was disarmed by a licence, and I see no reason to dispute either the existence of the licence or its authority," in support of his claim. In the case of *The Troija* (2) Dr. Lushington says this : "I entertain no doubt as to the correct practice in such cases, it is that when an enemy claims he must shew a persona standi in judicio, the law being that an alien enemy is not entitled in any way to sue in this or in any other Court." That follows what was laid down by Lord Stowell in the case of *The Hoop* (3), namely, that "In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a persona standi in judicio. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our Courts of the law of nations. They are so far British Courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that pro hac vice discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace pro hac vice. But otherwise he is totally ex lege"; and the law is succinctly put by Story J. on Prize Courts, at p. 21 : "Nor can an enemy interpose a claim unless under the protection of a

(1) (1819) 2 Eng. P. C. 233, at p. 236.

(2) (1854) Spinks, E. & A. 342.

(3) (1799) 1 Eng. P. C. 104, at p. 107, 1 C. Rob. 196.

flag of truce, a cartel, licence, pass, treaty or some other act of the public authority suspending his hostile character."

In this particular case there is nothing in the affidavit which tends to shew that the hostile character of the owners of this vessel is suspended in any way, nor is there any suggestion made by those who wanted to be heard in favour of the owners that there was anything in the nature of a licence to trade or a pass, or that there were any circumstances whatever differentiating the case of this alien enemy from that of any other alien enemy who might be affected by a decision of this Court. Therefore, both on the ground of insufficiency of affidavit and on the ground that I am satisfied that there are no substantial special circumstances which could be put in any other affidavit, I hold that the appearance ought not to stand, and I strike it out.

Now the other persons who have claimed are shareholders, mortgagees, and people who have incurred expenses for the vessel, for necessaries, brokerage, or other disbursements. Now, with regard to the shareholders in a vessel, it is quite clear that if they are enemy shareholders, their property must go with the capture of the vessel in which they have put their money —a vessel which sails under the enemy flag. Not only is that so with regard to shareholders who are citizens of the German Empire, but it is equally so in the case of shareholders belonging to this country. If a shareholder invests his money by taking shares in a vessel which is liable to capture, he takes that risk. Of course if a British shareholder likes to present his case to the Crown as a case which ought to be dealt with as a matter of grace, that is another thing. I have nothing to do with that; I am here only to administer the law, and I must decide that the shareholders in this case have no right whatever in law to be protected from any results of the capture of this vessel.

Similarly with regard to the persons—British citizens—who have advanced sums of money in various ways, or who may have claims for services rendered in the nature of brokerage, or otherwise, to this vessel. Here again, sitting as a judge of the Prize Court, I cannot give effect to any such claims. If they are to be allowed it will be from the bounty of the Crown, and as the Solicitor-General has said, from what we know of what takes

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THE MARIE GLAESER.

The President.

place in this country, any claim which they put forward in the right quarter will no doubt be fairly considered and generously treated by those who have a right to deal with these matters.

With regard to the claim of the mortgagees, Mr. Leslie Scott has stated that there is no decision in this Court by my predecessors against the claim put forward by mortgagees to have the mortgage debt paid out of the proceeds of the sale of the ship. In deference to his argument, and as it is a matter which affects, no doubt, very many people both in this country and abroad, I will—although I have very little doubt about what my judgment will be—look further into the questions he has raised, and will pronounce judgment upon this part of the case at an early date.

The decree I now make is that the vessel was properly seized as a prize of war at sea, and that she is subject to condemnation, and that I do condemn her and order her to be sold.

The Solicitor-General. Your Lordship will give me liberty to apply?

THE PRESIDENT. I will give you liberty to apply.

On the question of the mortgage held by the Dutch company judgment was reserved.

Sept. 16. SIR SAMUEL EVANS, PRESIDENT. This merchant vessel, belonging to enemy owners, was captured at sea on August 5 last by H.M. cruiser *Gibraltar*, and has already been condemned by the Court as lawful prize. She was a German vessel, registered at the port of Rostock, owned by a German limited company, commanded by a German master, and flying the German flag.

A claim has been made on behalf of certain mortgagees, who are neutrals—a limited liability company in Holland. Counsel who appeared for them did not contest the legality of the capture of the vessel, nor oppose the judgment of condemnation. The claim he put forward was that a sufficient sum out of the proceeds of sale of the prize should be set aside to satisfy the amount which might be found due to the mortgagees, on the ground that

they were, as neutrals, entitled to have their property or interests protected. He contended (1.) that no case in the English Prize Court had dealt with the claim of a neutral mortgagee in a sense adverse to the claim now put forward; (2.) that the decisions in our Prize Courts touching liens (as for example *The Tobago* (1)) were not applicable to the case of mortgages, on the ground that some kind of "property" in the ship passed to and vested in mortgagees; and (3.) that in any event at the present day the International Law of Prize should be extended and applied so as to protect mortgages held by neutrals in accordance with what he contended was the policy and principle upon which the Declaration of Paris was founded.

As I intimated at the conclusion of the argument last week, I did not feel much doubt as to what the judgment of the Court ought to be; but as the question arose in many other cases of neutrals, and in similar cases of British subjects also, and particularly as the Court was asked to enunciate what appeared to be new law, judgment was reserved for maturer consideration.

It will be convenient first to set out a few facts as to the mortgage. It was executed on June 26, 1905, by Otto Zelck (a subject of the German Empire) as manager of the German limited liability company known as the Steamship Company Marie Glaeser in Rostock in favour of a Dutch company called Eerste Nederlandsche Scheepsverband Maatschappij in Dordrecht, Holland, on certain conditions for a loan of 172,500 marks. The operative part of the mortgage was in these terms (translated):—

"I grant by these presents to the Dutch company a mortgage on the steamer *Marie Glaeser* registered in the ship's register in Rostock amounting to M.172,500 Germany currency."

The repayment with interest was spread over a term extending up to December, 1917; but in certain events the whole was made repayable immediately. Among the conditions were the following (translated):—

Sect. 3. "Moreover the Dutch company will be authorised without any further formality to insure the vessel against

(1) (1804) 5 C. Rob. 218; 1 Eng. P. C. 456.

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THE MARIE GLAESER.

The President.

imminent risk of war for the account of the mortgagor (borrower) at the utmost for the double of the moneys which have been advanced to the mortgagor (borrower), should the mortgagee (lender) be of opinion that such a risk is really imminent. . . . ."

Sect. 5. " The moneys which have been paid off (reimbursed) are either to be fully extinguished on the object of the loan or the priority must be secured to the mortgagee (lender) for the remainder of his claim above (before) the amount of the claim that has been paid off (reimbursed), even though therefore subrogation in favour of a third party should have taken place; if not, the Dutch company is authorised to claim without delay and any notice the reimbursement of the loan which has been granted, together with all accrued interests and expenses. . . . ."

Sect. 6. " The Dutch company will be authorised to claim without delay and any notice the reimbursement of the loan, together with the accrued interests and expenses:—

" I. Should the vessel get lost or be condemned. . . . .

" III. Should the vessel be alienated entirely or partly, or should the ship business be stopped. In the event of alienation, should the transfer (transmission) of the debt unto the acquirer not have taken place with the authorisation of the Dutch company, the mortgagor (borrower) has to pay to the Dutch company, besides the loan together with the accrued interests, a commission for renunciation, amount to 1 per cent. (one per cent.). The mortgagor (borrower) is bound to inform the mortgagee (lender) without delay of every transaction by which the property of the mortgaged vessel is transferred (transmissed) entirely or partly to another party or other parties. . . . .

" VI. In the event under I. the Dutch company is authorised to endeavour to make good her claim from the insurance policies, save her personal claims against the mortgagor (borrower) respectively his assigns. In the cases under II. to VI. the Dutch company is authorised, without the serving of a writ being previously required, to endeavour to enforce her claims on the vessel and her appurtenances. The mortgagor (borrower) remains by all means personally responsible towards the Dutch company for an eventual unexpected loss."

Sect. 8. " All disputes arising between the mortgagor

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(borrower) and the Dutch company are to be submitted to the competent Court of Justice of Hamburg."

It is stated in the affidavit in support of the claim that the amount remaining due was 69,000 marks. The mortgage was duly entered in the ship's register in Rostock.

It is not disputed that the mortgage represented an honest business transaction. The mortgagors remained, and were at the time of the capture, in possession of the vessel. No reference to the mortgage was entered upon any of the ship's papers.

With regard to the first two contentions of counsel for the claimants, even if there were no decision of our Prize Courts dealing with the claim of a mortgagee, a principle ought to be deducible, and in truth can clearly be deduced, from cases dealing with liens upon, or claims in respect of, captured vessels, the application of which should be decisive of the case now before the Court.

But it is not quite accurate to say that our Prize Courts have never adjudicated upon claims of a neutral mortgagee.

In *The Aina* (1) a claim was made by a person alleged to be a neutral who was mortgagee of one-third part of a captured enemy ship. Two questions there arose: (1.) Whether the claimant was a neutral; and (2.) whether, supposing him to be a neutral, he would be entitled to come to the Prize Court and claim one-third of the ship by virtue of the mortgage. It is true that the Court decided that the claimant was not a neutral, and that was enough to support the decision. But the Court also unequivocally stated that even if he were a neutral his claim could not be sustained. Dr. Lushington said :—

" If I am to do it in the present case, innumerable questions would arise, and the Court might be called upon to inquire into the validity of the mortgage, and be compelled to determine that validity, not by the law of England, but by the law of the country where it was executed."

With regard to the authorities generally, the first and leading case usually referred to is *The Tobago*. (2) Counsel for the

(1) (1854) Spinks, 8 ; 2 Eng. P. C. 247.

(2) 5 C. Rob. 218; 1 Eng. P. C. 456.

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claimant sought to distinguish that case, and even invoked the aid of certain passages or phrases in the judgment.

The claimant in that case was a British subject; the claim was founded upon a bottomry bond on a French vessel executed by her master to the claimant before hostilities between Great Britain and France had commenced. The claim was rejected upon the broad ground that the Court recognized no liens upon a captured vessel, with the special exception of some liens attaching by the general law of the mercantile world independently of contract. Lord Stowell in his judgment says:—

"It is a case of a bottomry bond given fairly in time of peace, without any view of infringing the rights of war, to relieve a ship in distress—a contract certainly regarded with great attention and tenderness by this Court when brought immediately before it. But can the Court recognise bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in a Court of Prize? The total silence of those who have argued for the claimant as to any precedents for this demand strongly shows that it has not been the practice of the Court to consider such bonds as property entitled to its protection; and I think I may venture to say that there has been no such instance. The person advancing money on bonds of this nature acquires by that act no property in the vessel; he acquires the jus in rem, but not the jus in re, until it has been converted and appropriated by the final process of a Court of Justice. The property of the vessel continues in the former proprietor, who has given a right of action against it, but nothing more. If there is no change of property, there can be no change of national character. Those lending money on such security take this security subject to all the chances incident to it, and, amongst the rest, the chances of war."

It may be observed in passing that by the mortgage in the case now before the Court the risk of war was expressly mentioned, and the mortgagees had the right at the expense of the mortgagors to insure against it if they thought war was imminent.

Then Lord Stowell, having dealt with the exceptional cases of

"an interest directly and visibly residing in the substance of the thing itself" (as freight on cargo), proceeds:—

"But it is a proposition of a much wider extent which affirms that a mere right of action is entitled to the same favourable consideration in its transfer from the neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this Court can enable it to examine them with effect. They are private contracts passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts, and it is therefore unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. In like manner his rights operate on no such liens where the property itself is protected from capture; indeed, it would be almost impossible for the captor to discover such liens in the possession of the enemy upon property belonging to a neutral. The consequence, therefore, of allowing generally the privilege here claimed would be that the captor would be subject to the disadvantage of having neutral liens set up to defeat his claims upon hostile property, whilst he could never entitle himself to any advantage from hostile liens upon neutral property. This Court therefore excludes all considerations of liens or incumbrances of this species. On the whole, I am of opinion that there is no instance in which the Court has recognised bonds of this kind as titles of property, and that they are not entitled to be recognised as such in the Prize Court, however much the Court of Admiralty may be disposed to uphold them in the other branch of its jurisdiction when they are brought directly before it."

The passages above quoted were expressly adopted by the Privy Council in 1857 in *The Ariel*(1); and the substance of the decision in this last case is succinctly stated towards the end of the judgment delivered by Sir John Patteson as follows:—

"Liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize."

It was contended that a claim under a mortgage was in some

(1) 11 Moo. P. C. 119, at p. 129; 2 Eng. P. C. 600.

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essential respects different from that under a bottomry bond. It is difficult to see in what respects, so far as regards the functions of a Prize Court.

It may be noted that by the municipal law of this country the claim of a mortgagee, whether in possession or not, ranks below the claims of persons who have maritime liens on the mortgaged ship, e.g., for bottomry, salvage, and wages: see *The Duke of Bedford* (1), *The Bold Buccleuch* (2), *The Mary Ann* (3), *The Feronia* (4), and *The Ripon City*. (5)

So if the mortgagees of the *Marie Glaeser* had been British subjects, and the effect of the mortgage depended on English law, *The Tobago* (6) would be an authority a fortiori against their claim.

As to the contention that the mortgagees in the present case had, by virtue of the mortgage, some kind of "property" in the *Marie Glaeser*, no information was given to the Court as to the exact meaning of the word "property" so used, or as to its nature, or whether it imported some kind of "ownership" of the vessel. By our own statute law, except so far as may be necessary for making a mortgaged ship available as a security for the mortgage debt, the mortgagee shall not, by reason of the mortgage, be deemed the owner of the ship, nor shall the mortgagor be deemed to have ceased to be the owner thereof: Merchant Shipping Act, 1894, s. 34.

Whether the German law as to mortgages substantially differs from ours, or what the German law on the subject may be, this Court declines to inquire. To do so is no part of the duty of a Court of Prize. The difficulties and delays of embarking upon any such inquiries have always been given by Prize Courts as reasons for not entertaining any claims for liens or charges on captured ships.

In *The Marianna* (7) (which was a claim by a neutral on a lien for unpaid purchase-money) Lord Stowell said:—

"Captors are supposed to lay their hands on the gross tangible

(1) (1829) 2 Hagg. Ad. 294.
(2) (1851) 7 Moo. P. C. 267, 284.
(3) (1865) L. R. 1 A. & E. 8.
(4) (1868) L. R. 2 A. & E. 65.
(5) [1897] P. 226, at p. 243.
(6) (1804) 5 C. Rob. 218; 1 Eng. P. C. 456.
(7) (1805) 6 C. Rob. 24; 1 Eng. P. C. 518.

property, on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule did not exist it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the Court which has to decide upon the question of property to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the Court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions."

It is not profitable to guess at the effect of the German mortgage deed; but there is certainly nothing upon the face of it which indicates any transfer of ownership, or anything other than a charge for the mortgage debt. Portions of the conditions before set out seem to negative anything of the kind; and how are captors at sea, or the Prize Courts on land, to solve puzzles and perplexities which might arise from the condition that, "All disputes arising between the mortgagor and mortgagees are to be submitted to the competent Court of Justice of Hamburg."

The fact has been stated that no reference to the mortgage is to be found in any of the ship's papers; and, so far as I am aware, no notice of or any information as to the mortgage was given to the captors or any one interested in the capture till the claim was put in in the proceedings. But these facts are really not material.

The truth is that capture of enemy vessels at sea during war would be a hazardous and almost worthless right of belligerents if the captors were confronted with such claims as are put forward in this case, or if mortgages gave to mortgagees prior rights to those of the captors.

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But counsel for the claimants, as his last resource, boldly pressed the Court to extend the law at the present day, so as to protect neutral mortgagees of enemy ships, on the ground that the law of nations has advanced, as he contends, in this direction, by and since the Declaration of Paris, 1856; and that such a protection is necessary to accord with the policy and spirit of the Declaration with regard to neutrals.

It is advisable to glance briefly at the way the Declaration has been dealt with by the nations. Before the Declaration of Paris the treatment of enemy goods under a neutral flag, and neutral goods under the enemy's flag, which was afterwards embodied in the second and third articles of the Declaration, was agreed to and observed by France and this country during the Crimean War. The Declaration itself—the terms of which "are not strictly authoritative law" (Hall, 6th ed. p. 687)—has been adopted by practically all the civilized States of the world except the United States of America.

The United States refused to become a party to it chiefly on the broad ground that they desired a complete exemption from capture at sea of all private property other than contraband. Nevertheless the United States announced at the beginning of the Civil War that they would give effect to its principles during those hostilities; and again in 1898, during their war with Spain, the President issued a proclamation on April 26, 1898, declaring that the policy of the United States Government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods not contraband of war are not liable to confiscation under the enemy's flag."

Spain also in the same year, while maintaining that she was not bound by the Declaration, gave orders for the observation of the rules that (1.) a neutral flag covers the enemy goods, except contraband of war, and (2.) neutral goods, except contraband of war, are not liable to confiscation under the enemy's flag: Hertslet, Commercial Treaties, XXI., 837.

Spain and Mexico, which had for half a century refrained from acceding to it, have recently formally acceded, the former State on January 18, 1908, and the latter on February 13, 1909.

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Our own country, one of the original parties to it, has steadfastly adhered to it.

This Court accordingly ought to, and will, regard the Declaration of Paris, not only in the light of rules binding in the conduct of war, but as a recognized and acknowledged part of the law of nations, which alone is the law which this Court has to administer.

But how can it be used or applied so as to support the claimant's case? This Court can only enunciate what it conceives to be the law of nations. If any matter of international law in controversy between nations requires to be settled by international convention, this Court cannot antecedently declare the controverted doctrine to be a part of international law.

The Declaration of Paris, in the two articles referred to, only dealt with goods or merchandise carried in vessels, and not with the vessels themselves. If it had been intended to deal with vessels, and property, rights, or interests in them, that would have been expressed. The object was to ensure the maintenance of maritime commerce by making certain goods carried over the seas immune from confiscation.

The lending of money upon vessels or "financing" their owners may be usual, necessary, and profitable as business transactions; but they cannot with propriety be put upon the same footing in international law as the commerce which constitutes the world-wide trade of the carriage of merchandise by sea. There does not appear to be any direct relation in principle between guarding the safety of this commerce upon its course across the oceans in the common interest of the nations, and giving protection by special rules of international law to persons or companies who invest their moneys in shipping ventures.

Apart, therefore, from any assistance which may be derived from decisions of various Prize Courts since the date of the Declaration, this Court could not accede to the suggestion that neutral mortgagees of vessels should have a rule of law created for their protection.

But have any decisions in any Prize Court since 1856 proceeded in the direction urged? Has any Court of Prize since assented

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to such a claim as is now being made? The answer, it is believed, is in the negative.

On the contrary there have been decisions against such claims. In 1866 the Supreme Court of the United States of America decided in *The Hampton* (1) that "in proceedings in prize, and under principles of international law, mortgages on vessels captured jure belli are to be treated only as liens, subject to being overridden by the capture, not as jura in re, capable of an enforcement superior to the claims of the captors." (See first part of the head-note.)

The claimant there was "a loyal citizen," and the bona fides of his mortgage was not disputed. His claim was to have the amount of his mortgage paid to him out of the proceeds of the sale of the captured vessel. Miller J., in delivering the opinion of the Supreme Court, said:—

"The first ground on which the appellant relies is that the mortgage being a jus in re, held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was in delicto by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the Prize Courts the strict common law doctrine which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern Admiralty Courts to treat mortgages as the Equity Courts treat them as mere securities for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a Prize Court from recognising the doctrine here contended for. If it were once admitted in these Courts there would be an end of all prize condemnations. As soon as a war was threatened the owners of vessels and cargoes which might be so situated as to be subject to capture would only have to raise a sufficient sum of money on them by bona fide mortgages to indemnify them in case of such capture. If the vessel or

(1) 5 Wall, 372.

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cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his hands already. The mortgagee having an honest mortgage which he could establish in a Court of Prize would either have the property restored to him or get the amount of his mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break a blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. A principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all dangers to parties disposed to break them cannot be recognised as a rule of Prize Courts. There seems to be no reason to doubt the loyalty of the appellant or the fairness of his debt, and we regret our inability to provide for his claim. But until international treaties, or an act of Congress, shall mark another stage in the meliorations of the rigors of war, we are not at liberty to interpolate a principle which would tend so materially to destroy the right of prize capture in time of war."

So in 1867 in *The Battle* (1), also in the Supreme Court of the United States of America, Nelson J., in delivering the judgment, said : " The principle is too well settled that capture as prize of war, jure belli, overrides all previous liens, to require examination." And in the case previously cited mortgages were treated as liens.

In 1870, in the Prize Court of France, a claim was made by Hoffman & Co., British shipbrokers, who had a mortgage upon a Prussian ship *Der Turner*, that a sum to discharge the mortgage should be set aside from the proceeds of sale. It was there suggested that the claim might be allowed " by analogy and in accordance with the principles established by the Paris Conference that neutral property under an enemy flag is not subject to capture." But the decision was against the claim. It is summarized in these words : " La propriété du navire, au point de vue de l'exercice des droits de la guerre, est indivisible. L'hypothèque consentie sur un navire d'après les lois allemandes

(1) 6 Wall, 498.

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ne donne pas au créancier, sujet neutre, le droit de réclamer le bénéfice de la déclaration du Congrès de Paris."

In the course of the judgment the Court said: "Mais, attendu que la propriété du navire, au point de vue de l'exercice du droit de guerre, est absolument indivisible; que ce principe est admis d'une façon constante par les tribunaux maritimes de tous les peuples de l'Europe, et notamment par la cour de l'Amirauté anglaise; qu'ainsi le sujet neutre, co-propriétaire d'un navire naviguant sous pavillon ennemi et ayant droit à porter ce pavillon, ne peut, si ce navire est capturé, revendiquer contre le capteur sa part de co-propriété; qu'en supposant même que l'hypothèque permise par la loi prussienne sur le navire pût être, comme l'hypothèque constituée par les lois françaises, considérée comme un démembrement de la propriété, cette hypothèque ne pourrait apporter aucun obstacle à l'exercice absolu du droit de la guerre; que la première reclamation des sieurs Hoffman et Cie. doit donc être rejetée." Barboux, Jurisprudence du Conseil des Prises, 1870-1871 (Paris, 1872), p. 76.

In 1899, again, the Supreme Court of the United States of America in *The Carlos F. Roses* (1) dealt with the subject exhaustively in a claim put forward by a British company which had advanced money upon a cargo on a captured ship, and which had received bills of lading covering the shipments. Fuller C.J. delivered the judgment of the Court. In the course of his judgment he said at p. 666:

"The right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties. Hence the Prize Courts have rejected in its favour the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading."

He also cited with approval the following passage from *The Frances* (2):—

"The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so

(1) 177 U. S. Rep. 655. (2) (1814) 8 Cranch, 418.

has a consignee for advances made by him to the consignor. . . . . But this doctrine is unknown in Prize Courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . . . But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the Prize Courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those Courts."

The Chief Justice also cited with approval the decision in *The Hampton* (1) and *The Tobago*. (2)

To come down to a later and recent date, in 1905 during the Russo-Japanese war, the Sasebo Prize Court in Japan followed the same lines. In *The Nigretia* (3) a preferential claim was made, apparently by a Japanese subject, for salvage expenses incurred before the seizure. It was argued for the petitioner that the preferential right claimed was an "actual right recognised by law, *and not based upon a voluntary contract like a mortgage*," and that therefore it was entitled to protection.

The Court of first instance pronounced that "according to international law, the right of a captor being absolute, neither the real right" (by which, no doubt, is meant a right in rem) "nor the obligatory right of a third party can be set up against it."

On appeal the higher prize Court confirmed this doctrine and the decision. (4)

In another case in the same Court in 1904—*The Russia* (5)—a claim for a prior right for necessaries was made. The Court said: "If the ship is a lawful prize she cannot be released on account of a neutral person having a claim against her. Even

(1) 5 Wall, 372.
(2) 5 C. Rob. 218.
(3) Takahashi, 551.
(4) Takahashi, 553.
(5) Takahashi, 557, at p. 559.

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though the petitioner's claim was created by the disbursement of the ship's necessary expenses for continuance of the voyage, a third party has no right to make any claim upon the property, as not only is there no provision in our Prize Court regulations recognizing a prior claim upon a prize, but according to international law, the right of the captor to a prize confiscated as the enemy's property is absolute."

These are some of the cases which have come before Courts of Prize since 1856. They follow closely the principles of the older decisions.

The claimants' counsel admitted that he was not able to cite in favour of his contentions any decision of any Court, or any statement of any of the eminent writers and jurists of this or other countries. Probably no such decision or statement exists.

The Court has no hesitation in pronouncing that upon the authorities, upon principle, and upon grounds of convenience and practice, the claim of the neutral mortgagees of this captured vessel must be rejected. The same conclusion would be arrived at if the claim were by British subjects. It need scarcely be added that the Crown, being entitled to captured property, may out of its bounty deal favourably with any such claims.

The case has thus far been dealt with from the points of view presented at the Bar. But there is also another broad ground which can be shortly stated, upon which the claimants could not succeed in any view of their rights. Even assuming that they had a "property" in the vessel, or even if they had rights of ownership and could properly be regarded as the owners of the whole or any part of the vessel, the fact that the vessel was sailing under the German flag, with papers entitling her to do so, and navigated by a German master in the commerce of the German Empire, would be fatal to their claim: see *The Vigilantia* (1); *The Vrow Elizabeth* (2); *The Primus* (3); *The Industrie.* (4) The doctrine is summed up in Hall's International Law, 6th ed. at p. 498. I will make one further reference to

(1) (1798) 1 C. Rob. 1; 1 Eng. P. C. 31.

(2) (1803) 5 C. Rob. 4; 1 Eng. P. C. 409.

(3) (1854) Spinks, 48; 2 Eng. P. C. 290.

(4) (1854) Spinks, 54; 2 Eng. P. C. 297.

one of our late eminent international jurists. Apart from the acknowledged authority which attaches to the work and opinions of the late Mr. Westlake, there is ample judicial support for this statement in the passage in his International Law—War (1913 ed.) at p. 169 :—

" If a ship sails under the enemy flag, the character which her owner or any of her part owners may have as individuals is immaterial. By accepting the flag they have placed themselves under its protection ; if that fails them she may be captured, and will be condemned, and no share which a friend may have in her will be saved. A mortgage or lien on a ship sailing under the enemy's flag, whether it arises by contract or by law as a factor's lien—unless it is a general law of the mercantile world, as that which gives the lien of freight—is treated as a part interest in the ship, and is not saved from the condemnation."

Upon all these grounds the Court rejects the claim of the mortgagees, but no order will be made against them in respect of costs.

Solicitor for the Crown : *The Treasury Solicitor.*

Solicitors for the owners and parties interested in disbursements, &c. : *Thomas Cooper & Co.*

Solicitors for the mortgagees : *Lightbound, Owen & Co.*

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June 25, 29.

[IN THE COURT OF APPEAL.]

OLLIER *v.* OLLIER.

Divorce—Dissolution of Marriage—Variation of Settlements—Allowance to Guilty Wife—Dum casta et sola vixerit.

Upon an application for variation of marriage settlement by a husband who had obtained a decree for dissolution of his marriage it appeared that the petitioner and the respondent were married in 1902. The latter had no means, but the husband by an ante-nuptial settlement assigned to trustees certain furniture and a moiety of the residuary estate under his mother's will upon trusts under which the respondent took the first life interest. The decree was made absolute in November, 1913, and the husband then presented his petition for variation of the settlement by extinguishing all the rights of the respondent thereunder. It appeared that the income of the settled property amounted to 137*l.* a year, and the petitioner refused to make any allowance. Bargrave Deane J. made an order that the wife's interest in the settlement should be extinguished, except that the trustees thereof should pay to her 30*s.* a week for life, and refused to insert a dum casta clause.

The petitioner appealed and contended that the weekly allowance was excessive and that the clause ought to be inserted :—

Held, that the allowance must be reduced to 1*l.* a week, and that a dum casta clause must be inserted.

Appeal from a decision of Bargrave Deane J.

The petitioner (husband) and the respondent were married on October 8, 1902, and there were two children of the marriage born in 1904 and 1905. By an ante-nuptial settlement the petitioner conveyed to the trustees (*a*) certain furniture for the use of the respondent for life and on her death, or that of the petitioner, for the survivor absolutely ; (*b*) a moiety of the residuary estate under the will of the petitioner's mother upon trust to pay the income thereof to the respondent for life and after her death to the petitioner for life provided he maintained the children of the said marriage out of such income, and after the death of the survivor of the petitioner and respondent for such one or more of the said children as the petitioner should appoint, and in default of children for him absolutely. This settlement was prepared without any instructions from the petitioner, and both he and the respondent

thought that the first life interest was given to him; no notice of it was given to the trustees of the petitioner's mother's will, and they continued to pay the income to him. The respondent brought nothing into settlement.

In 1910 the petitioner and respondent separated, and on September 29, 1910, an indenture was executed by them whereby he agreed to pay her five guineas a week for the maintenance of herself and the children so long as she remained chaste and so long as he continued to receive the income, and the respondent was to have the use of the furniture. Subsequently the husband instituted proceedings for a divorce by reason of the wife's adultery. It was stated that she and the co-respondent defended the proceedings by the same solicitor and the learned judge refused to make any order as to the wife's costs. A decree nisi was pronounced on May 2, 1913, and made absolute on November 10, 1913.

On December 10, 1913, the husband presented a petition for variation of the settlement by extinguishing all the interests of the respondent thereunder and for an order that she should deliver up the furniture and effects the subject of the settlement. It appeared that the income of the settled property amounted to 137*l.* a year. The matter was referred to the registrar to report. The petitioner refused to make any allowance, and the matter came before Bargrave Deane J., who made an order that the wife's interest in the settlement should be extinguished, except that the trustees thereof were directed to pay to the wife the sum of 30*s.* per week for life, and refused to insert a dum casta clause.

The husband appealed.

Hume Williams, *K.C.*, and *Rayden*, for the appellant. This appeal raises the question whether the interest of the guilty wife under the marriage settlement should be extinguished and upon what terms. She brought no property into the settlement. After the decree nisi the payments to her under the deed of separation stopped, and after the decree absolute no payments were made to her under the settlement. On December 10 the husband filed his petition for a variation of the marriage settlement, and the registrar made a report to the Court to the effect (inter alia) that

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the wife's interest should be extinguished. The judge approved the report but varied it by adding a direction that the trustees should pay the wife 30*s.* a week without the dum casta clause. The net income of the settled property is 137*l.* per annum, and the result is that the husband will lose 78*l.* per annum, and the guilty wife may marry again or continue to lead an immoral life at his expense. It may be admitted that the Court has a discretion, but it is submitted that the judge exercised his discretion wrongly. The petitioner does not object to a small allowance being made to the wife, but he insists on the dum casta clause.

Barnard, *K.C.*, and *R. Gwynne*, for the respondent. This case is within the class of cases in which, where a small allowance is made to the guilty wife, the dum casta clause is often not inserted. This Court will consider all the circumstances and not interfere unless it thinks that the judge has gone so wrong that the order ought not to stand: *Wigney* v. *Wigney*. (1) In *Jump* v. *Jump* (2), *Clifford* v. *Clifford* (3), and *Lander* v. *Lander* (4) no dum casta clause was inserted in the order.

[PICKFORD L.J. referred to *Squire* v. *Squire*. (5)]

There are no special facts here to justify the insertion of the clause. There is no general rule that the clause ought to be inserted; the facts of each case have to be considered; the learned judge has exercised his discretion and the Court will not interfere: *Wood* v. *Wood*. (6) It has been difficult to ascertain the real amount of the petitioner's income, and 30*s.* a week is not too much for him to pay to the respondent.

Le Bas, for the trustees.

Rayden in reply.

SWINFEN EADY L.J. stated the facts and continued: The husband appeals on two grounds. First, he claims that having regard to the income of the settled property the amount allowed to the wife is excessive, and, secondly, he contends that under the circumstances of this case the dum sola et casta clause ought to

(1) (1882) 7 P. D. 177.
(2) (1883) 8 P. D. 159.
(3) (1884) 9 P. D. 76.
(4) [1891] P. 161.
(5) [1905] P. 4.
(6) [1891] P. 272.

have been inserted, and the payment to the wife ought to have been made conditional upon her behaviour. On the other hand, for the wife it has been urged that the matter has been before the learned judge and he has exercised his discretion on all the facts of the case, and that it requires a strong case for the Court of Appeal to interfere with the discretion of the learned judge. [The Lord Justice stated the effect of the evidence with regard to the amount of the petitioner's income.] It appears now, and it seems to be conceded, that the average income for three years was about 137*l.* 10*s.* a year derived from the settled property. So that a moiety of that would be 68*l.* 15*s.* and the wife was ordered to receive 78*l.* It is unusual, where the whole fund is brought into settlement by the husband, that the allowance in favour of the guilty wife should be of more than a moiety of the settled fund.

On the other point it was urged that the learned judge followed a practice in the Court below, settled by *Lander* v. *Lander* (1), which decided that it is not usual to insert in a provision of this nature the dum sola et casta clause. It is to be observed with regard to that case that the husband and wife were living separately and had had no communication for many years. The wife committed adultery, and on the decree nisi the learned judge intimated that the decree would not be made absolute without provision having been made for the wife. In *Squire* v. *Squire* (2) Sir Francis Jeune P. referred to *Lander* v. *Lander* (1) as follows: "In the view I take of this class of case, it is material that the dum casta clause should be inserted. The wife should know and should be made to feel that her livelihood depends on her leading a chaste life in the future. In cases where the wife has not been proved to have committed adultery I should be slow to insert the dum casta clause. But, where the wife is proved guilty of adultery, I am of opinion that the strongest pressure ought to be put upon her not to lapse again into sin. I cannot bring myself to believe that Sir James Hannen could have intended as a consequence of his decision in *Lander* v. *Lander* (1) that a husband should be called on to support a wife who was leading a life of prostitution. Although I do not lay so much stress

(1) [1891] P. 161. (2) [1905] P. 4.

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upon the dum sola clause, I think that too ought to be inserted, and that the husband ought not to be called on to contribute to the support of his divorced wife if she should become the wife of another man." In my opinion that is the true principle that ought to guide the Court in dealing with cases of this sort. Previous cases have been decided in accordance with this principle. In *Wigney* v. *Wigney* (1) it was the wife's fortune that was brought into settlement, and the wife who obtained the decree for dissolution of the marriage. In that case Lindley L.J. said: "Suppose the appellant"—in that case the husband—"were to marry the woman with whom he has eloped, it would be shocking that any part of the wife's income should go to maintain him and the woman who is at the bottom of the mischief." Although the Court is slow to interfere with the exercise of the discretion of the judge of first instance, yet in each of the three cases to which counsel referred the Court of Appeal did interfere with the discretion of the learned judge below. It was so in *Wigney* v. *Wigney* (1), it was so in *Jump* v. *Jump*. (2) There was a covenant there to pay an annuity of 15*s*. a week, and it was reduced to 10*s*. So in *Clifford* v. *Clifford* (3), where the settled income was 52*l*. a year, and on the facts in that case it was reduced to 26*l*. a year.

In the present case, having regard to the small extent of the fund, producing only during the three years in question 137*l*. 10*s*. a year, I am of opinion that the proper order to make would be to allow the wife 1*l*. per week out of the settled property, and that having regard to the past it would be right and proper that the dum sola et casta clause should be inserted. If unfortunately the lady should lapse into misconduct it would not be right that the income of the fund brought into settlement by the husband should be taken to maintain her whilst living in that way; or again, if she should marry either the co-respondent or anybody else, that recourse should be had to the husband's small settled fund to provide for the wife's maintenance after she has married a second time. In my opinion the proper order to make is to allow 52*l*. a year, in the form that the trustees be directed

(1) 7 P. D. 177. (2) 8 P. D. 159.
(3) 9 P. D. 76.

to pay her out of the settled property the sum of 1*l.* per week, and that the dum sola et casta clause be inserted. With regard to costs, I think there should be no costs of the appeal.

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PICKFORD L.J. I am of the same opinion.

Appeal allowed.

Solicitors: *Radford & Frankland, for Walker, Dean & Co., Manchester; F. G. Aylett; Barlow, Barlow & Lyde, for James Chapman & Co., Manchester.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A. 1914 *July* 23.

MAIDLOW *v.* MAIDLOW.

Divorce—Decree—Permanent Maintenance—Order for Payment to Wife during Life—Consent Order—Power to vary—Estoppel—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1, *sub-ss.* 1, 2.

A wife, having obtained a divorce from her husband in 1908, petitioned for an order for permanent maintenance. The registrar reported that the parties had agreed that the amount to be paid by way of maintenance should be 90*l.* a year for the wife and 30*l.* a year for the only child of the marriage until she should attain the age of twenty-one years, and the registrar submitted that the husband should be ordered to pay the agreed amount "to the wife for her life." An order was accordingly made in that form. In 1913 the wife petitioned for an increase of maintenance, and the husband presented a cross-petition for a decrease. At the hearing before the registrar the wife withdrew her petition and contended that there was no power to vary the consent order. The registrar so held, and the President affirmed his decision and dismissed the husband's petition:—

Held, on appeal, that having regard to s. 1 of the Matrimonial Causes Act, 1907, an order for payment to the wife "during her life" could only be made by consent, and the order being so made could not be varied; and that the wife was not estopped from relying on the order as a consent order by reason of her having presented and withdrawn a petition for an increase of maintenance.

APPEAL from an order of the President dismissing the respondent's appeal from an order of the registrar whereby he dismissed a petition by the respondent for the reduction of permanent maintenance to be paid by the respondent to the wife.

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The parties were married on June 7, 1894, and there was issue of the marriage one daughter only, who was born in 1895. On July 23, 1907, the wife obtained a decree nisi for divorce, which was made absolute on February 3, 1908.

On February 13, 1908, the wife presented a petition for permanent maintenance, and the matter was referred to the registrar to make a report. On May 19, 1908, the registrar made his report. After stating the facts as to the respective means of the parties the report continued: "A suggestion was made by me on the first hearing which with a trifling variation was assented to by both parties when they came before me again. The amount to be paid is therefore agreed. It is 90*l.* a year for the petitioner and 30*l.* a year for the daughter till twenty-one. The usual course would be that such an order should be made on summons by a registrar. The petitioner has however been advised by her counsel that, for her greater security against the respondent's creditors, actual or possible, she should ask for an order to be confirmed in open Court. It is therefore submitted that the respondent should be ordered to pay the agreed amount of 90*l.* a year to the petitioner for her life and 30*l.* a year to the daughter till she is twenty-one, such payments to begin from February 3, 1908, the date of the decree absolute."

On June 1, 1908, an order was made by Bargrave Deane J. "that this report be confirmed and that the respondent pay the agreed amount of 90*l.* a year to the petitioner for her life and 30*l.* a year to the daughter till she is twenty-one, such payments to commence from the date of the decree absolute herein."

On October 13, 1913, the wife presented a petition for increase of permanent maintenance on the ground that since the date of the order of June 1, 1908, the property and income of the respondent had increased.

On December 13, 1913, the husband presented a cross-petition for a decrease of the amount of maintenance.

When the matter came on for hearing before the registrar the wife's petition was withdrawn, it being contended on her behalf that the order being a consent order the Court had no power to vary it, and on June 23, 1914, both petitions were dismissed by the registrar. The husband appealed from so much of the

registrar's order as dismissed his petition, and the President dismissed his appeal. The husband now appealed to the Court of Appeal.

R. F. Bayford, for the appellant. There was never any consent such as to prevent the parties from applying to increase or decrease. An order in the form of that made in June, 1908, cannot preclude the right of the parties to come to the Court for an increase or decrease of the amount of maintenance when the circumstances have materially altered. The only consent was as to the amount of the maintenance under the circumstances existing at the time of the order. By the Matrimonial Causes Act, 1907, s. 1, sub-s. 1, the Court has power on a decree for dissolution to order the husband to secure to the wife such gross sum or such annual sum for any term not exceeding her life as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable. That sub-section does not apply, but by sub-s. 2, "In any such case the Court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the Court may think reasonable, and any such order may be made either in addition to or instead of an order under the last preceding sub-section: Provided that—

"(*a*) If the husband afterwards from any cause becomes unable to make such payments it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the order wholly or in part as the Court may think fit; and

"(*b*) where the Court has made any such order as is mentioned in this sub-section and the Court is satisfied that the means of the husband have increased, the Court may, if it thinks fit, increase the amount payable under the order."

This is an order on the husband to pay a certain annual sum to the wife, and the Court has power under sub-s. 2 (*a*), if the husband becomes unable to make the payment, to discharge or modify the order. Assuming that the insertion of the words

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"for her life" constitutes an implied agreement not to apply for a variation of the order, that agreement has been waived by the wife in view of her petition for increase and the husband has accepted that waiver, and a fresh agreement is thereby constituted.

Le Bas, for the wife. It is admitted that a mere agreement as to the amount of maintenance does not oust the jurisdiction of the Court to vary it, but it was not suggested in the Court below that the order of 1908 was not a consent order for the payment of a certain sum during the life of the wife; and that cannot be varied. The wife's petition was filed in error and was withdrawn when the form of the order was observed. She is not estopped from now relying on the order as a consent order which cannot be varied.

Bayford in reply. The husband's acceptance of the waiver by the wife constituted a fresh agreement. The insertion in the order of the words "for her life" was made per incuriam and does not oust the jurisdiction of the Court to vary it.

SWINFEN EADY L.J. This is an appeal by the husband against so much of the order of the President as dismissed the husband's petition for the reduction of the amount of maintenance ordered to be paid to the wife. The order for the dissolution of the marriage was made on the petition of the wife on the ground of cruelty and adultery. The matter was referred to the registrar to report upon the wife's petition for an order for permanent maintenance. On May 19, 1908, the registrar made his report. He therein sets out the marriage between the petitioner and the respondent, the issue of the marriage, and that the wife had obtained a decree nisi for dissolution of the marriage, and that the decree was made absolute on February 3, 1908. He then sets out the pecuniary position of the husband and the wife, who were both people of small means. [The Lord Justice then read the first part of the report dealing with the suggestion made by the registrar himself and with the advice of the petitioner's counsel that she should ask for an order to be confirmed in open Court, and continued:] I pause there. The report afterwards contains a submission which goes beyond that. If the report had stopped

there and there had not followed the subsequent clause in the submission, and there had been an order by consent in the language of the statute for the payment of maintenance to the wife during the joint lives of the husband and wife, then in my opinion the mere fact that the parties had agreed the amount to be paid would not have prevented an application from being made under the provisions of s. 1, sub-s. 2 (*a*), of the Matrimonial Causes Act, 1907, if the circumstances of the parties afterwards changed. It may well be that the parties consented to what would be a proper allowance, having regard to the means of the husband and wife, and it may well be that they determined on a proper amount rebus sic stantibus. If, however, there should be a material change of circumstances after the order has been made even though by consent for the payment of the sum agreed upon for their joint lives, that fact would not prevent an application being subsequently made, if circumstances altered, for the sum to be increased or decreased.

The report, however, continues: [The Lord Justice then read the conclusion of the report and continued:] It is objected that, unless the parties consented to an order in that form, there was no jurisdiction in the judge to make such an order. He could order payment of maintenance during the joint lives under the statute, but there is no power under s. 1, sub-s. 2, to order payment to the wife during her life. Under s. 1, sub-s. 1, there is power to secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to the various circumstances, may be deemed reasonable, and under sub-s. 2 power to order payment to the wife during their joint lives of such monthly or weekly sum as may be reasonable. It is urged that there was a bargain between the husband and wife, which the Court is not at liberty to vary, and that the wife accepted a less sum than she might otherwise have claimed, so that she might have the advantage of receiving it for her life. In my opinion an order so made cannot be subsequently varied.

Then it is said that by her petition the wife herself has sought to vary the order, but the argument based upon that cannot in my view be maintained. There has been no fresh bargain. As

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soon as the matter passed into counsel's hands and the form of the order was observed the petition was withdrawn. The registrar also noted the same objection, and the petition was dismissed.

This conclusion to which I have come is founded upon the words appearing in the order "for her life." Mr. Bayford has said that he has evidence as to the circumstances in which the words came to appear in the report and in the order. This judgment proceeds upon the footing that those words are there. Any application to correct the order must be made to the Court below. If, as is said, the words are only there per incuriam, the order ought to be corrected, and the position will be different. But the words are there now, and it is not open to us to consider an application to strike them out. This appeal fails, with the usual consequences.

PICKFORD L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitor for appellant: *J. D. Arthur.*

Solicitors for respondent: *Willis & Willis, for E. J. Howard, Bournemouth.*

G. A. S.

Referred to. THE UNITAS [1950] A. C. 536

HIGH COURT OF JUSTICE.

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Oct. 12, 15.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(IN PRIZE.)

THE TOMMI.

(No. 14.)

THE ROTHERSAND.

(No. 69.)

Prize Court—Nationality of Ship—Flag—Transfer in transitu—Registration—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 1—*English Company consisting of Alien Enemy Shareholders—Effect of War imminent or actual—Declaration of London, arts.* 55, 56, 57—*Detention of German Vessel.*

On the day war was declared between Germany and Russia (August 1, 1914), an English company wired to a German company accepting an offer to sell to the English company two vessels belonging to the German company then on the high seas, and flying the German flag. On August 4 war was declared between England and Germany, and, on the next day, the vessels were detained as prizes by collectors of Customs in English ports:—

Held by the President (Sir Samuel Evans), on making an order for the detention of the two vessels, that (1.) the nationality of a vessel is determined by the flag she is entitled to fly, and at the time of seizure that flag was German; (2.) that the alleged transfer in transitu was invalid, as mere communications, which may suffice to bind the parties, are insufficient to change the ownership of the property as against captors, whether imminent or actual belligerents; and (3.) though an English company, registered in this country under the Companies Acts, has a separate entity and can own a ship, query whether a company, nominally English, but consisting (as in this case) entirely of aliens, can own a British vessel.

IN July, 1914, the German sailing vessel *Tommi* (P. Neumann, master), of the port of Hamburg, owned by a German company, the Norddeutsche Kraftfutter Gesellschaft, left Dantzic, laden with molasses consigned to an English company, and after calling, on July 28, at Cuxhaven, arrived at Gravesend on August 5 (the day after the declaration of war between Great Britain and Germany), and was detained as prize by the collector

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of Customs. Similarly, the schooner *Rothersand*, owned by the same German company, was, on the same day, detained by the officer of Customs at Kirkcaldy, at which port she had arrived on August 3.

On August 1 (the day on which war was declared between Germany and Russia) both these vessels were on the high seas, and both were flying the German flag. On that day, as the result of communications (detailed in the judgment of the President) between the German company and an English company, called the Sugar Fodder Company, Limited, of Millwall, the German company telegraphed to the English company to the effect that they would sell the *Tommi* to the English company for 30,000 marks, and the *Rothersand* for 35,000 marks, and, on the same day, the English company telegraphed acceptance.

In these circumstances, counsel for the Crown, when asking for an order for detention similar to that made in the case of *The Chile* (1), suggested that, at the best, the proceedings between the German company and the English company, with a view to the transfer in transitu of the two ships to the British flag, were incomplete, the necessary formalities not having been complied with; in other words, it was an attempt to defeat belligerent rights, when war, then imminent, became actual: see as to the effect of the flag on the nationality of a ship, *The Vrow Elizabeth*. (2)

On the other hand it was contended on behalf of the claimants, the Sugar Fodder Company, that, on August 1, there was a bona fide binding contract between the German company and the English company for the sale of the two vessels by the German company to the English company, at the prices mentioned above, and that the property had passed, for, at that time, Great Britain was a neutral Power, so that such a contract could be entered into with a view to a transfer by bill of sale, and subsequent registration under ss. 7, 8, 9, and 24 of the Merchant Shipping Act, 1894. When this was effected, the vessels could be navigated under the British flag, and in the meantime could be used as hulks, so that the flag in port was not material. It was further pointed out that the position of a company in law was that of a separate entity to which property can be

(1) [1914] P. 212. (2) (1803) 5 C. Rob. 4; 1 Eng. P. C. 409.

transferred—see *Salomon* v. *Salomon* (1)—and reference was made to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 17, 18; and on the question of the effect of domicil on enemy character, Westlake's International Law—War, pp. 141, 142, and Hall's International Law, 6th ed., p. 491; Palmer on Company Law, 9th ed., p. 362; and counsel for the company in reply (by leave), with further reference to the national character of a ship, cited *The Vigilantia* (2), *The Caroline* (3), *The Baltica* (4), *The Aina* (No. 1) (5), and *The Belvidere*. (6)

1914. Oct. 12, 15. *Aspinall, K.C.*, and *Rayner Goddard*, for the Crown in the case of the *Tommi*.

Bateson, K.C., and *Rayner Goddard*, for the Crown in the case of the *Rothersand*.

Laing, K.C., and *Arthur Pritchard*, for the Sugar Fodder Company, claiming damages to cover demurrage and all losses, costs, charges, and expenses incurred by reason of the detention of the two vessels.

SIR SAMUEL EVANS, PRESIDENT. The claim herein is made by a company registered in England—the Sugar Fodder Company, Limited—to the ownership of two vessels, one called the *Tommi*, and the other called the *Rothersand*, which have been seized in British ports. The *Tommi* was seized at Gravesend, and the *Rothersand* was seized in the port of Kirkcaldy. Both were seized after the outbreak of hostilities between this country and Germany, the date of the seizure being in each case August 5. These ships belonged to a German company—the Norddeutsche Kraftfutter Gesellschaft. Some time in July these ships left German ports, and on August 1—which is an important date in this case—both of them were on the high seas. It is said that the ships were sold bona fide, and that there was a sufficient transfer from the original owners to the alleged new owners, the Sugar Fodder Company, Limited, while the ships were in transit.

(1) [1897] A. C. 22.
(2) (1798) 1 C. Rob. 1.
(3) (1855) Spinks, 252.
(4) (1857) 11 Moo. P. C. 141; 2 Eng. P. C. 628.
(5) (1854) Spinks, 8; 2 Eng. P. C. 247.
(6) (1813) 1 Dods. 353; 2 Eng. P. C. 183.

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The facts are very simple, and I had better state them at once before I say anything about the law relating to the matter, or about the bona fides. The first that this Court knows of any negotiation between the parties—because I cannot rely upon certain intentions said to have been held as to the transfer at some time or other of these ships from the German company to the English company—is what appears in the letter of July 31, 1914, which was written by the Sugar Fodder Company, Limited, the English company, to the German company. The portion of the letter that refers to the matter is this: "If *Tommi* should not arrive in time we are going to land this 100 tons on our wharf, so that we make sure of this 100 tons should there be a European war, then of course there will be no chance whatsoever to ship any gluten feed, and of course all contracts would be cancelled. . . . .

"Sailing Vessels. If your sailing vessels (in case of war) should be in this country, we think it would be advisable if the Sugar Fodder Company bought same, so that they may not be captured by any other nation."

On August 1 another letter was written by the English company to the German company before the first telegram of that date was despatched. That letter contains the following passages:—

"*Tommi.* We note that she left Cuxhaven on the 28th.

"Gluten Feed. There is no chance of buying gluten feed for forward positions, as there are no sellers on the market.

"Monday is Bank Holiday in London, and if you should have anything to wire please wire to writer's private house.

"Should *Tommi* arrive here and war has broken out, we will take *Tommi* as well as *Rothersand* over for our account, but we are not quite certain whether this transaction will stand good as both vessels are registered in Hamburg."

In this last paragraph the writer of the letter (Mr. Gunther) shewed an intelligent appreciation of what the law was, or what the law was likely to be. On the same day there was received by the English company, after that letter was written, but before it reached its destination, a telegram from the German company to the English company, "We sell you *Tommi* for 30,000 marks and *Rothersand* for 35,000 marks, wire acceptance.—Nordkraft."

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I do not know whether that is an offer to sell, or a direction from the directors over there to the directors over here, saying, "You must take it that this company sells, whether you like it or not, and that your company takes, the *Tommi* for 30,000 marks, and the *Rothersand* for 35,000 marks, and you must wire acceptance." It is clear that the German company had the control of the English company. Whatever the proper reading of that telegram is, a telegram in reply was sent on August 1 by Mr. Gunther, representing the English company: "Accept both sailing vessels *Tommi* and *Rothersand* for our account." Mr. Gunther also says that he wrote another letter on that same day, August 1, from his own private house, a copy of which he did not keep, and the contents of which are not known to me.

On August 1 war began between Germany and Russia. These transactions, whatever their effect may be, took place on that same day, and it is obvious, whether they took place after the hour when war was proclaimed, or before—if I remember aright, there was a despatch from Germany to Russia, which culminated in a state of war, which was sent at ten minutes past 7 on August 1—but, in any event, these transactions took place when war was imminent. War was not declared between this country and Germany until August 4 at 11 o'clock at night, and, therefore, at this time on August 1 this country was a neutral country. I have grave doubts whether there was not an apprehension in the mind of Mr. Gunther—I have graver doubt whether there was not an apprehension in the mind of Mr. Schrader, in Hamburg—as to the imminence of war between Germany and this country at that time. The letter to which I have already referred, and on which counsel for the Crown rely, I think shews that there is room for the doubt which I have just expressed. However that may be, I do not think it is necessary, for the purpose of deciding this case, to shew that they had the probability of war between this country and Germany in their minds. The transfer which is alleged to have taken place was a transfer in order to defeat the right of a belligerent. Russia, or any other Power which became a belligerent, would have the right to capture the vessels at sea if they remained German ships. The question is, whether

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such a transfer can be made so as to defeat the rights of a belligerent and with that intention. That is the test. And, if by reason of anything relating to the transfer it is invalid, of course, when Great Britain became a belligerent, she had the right to seize these vessels in port as property belonging to a State then at war with her.

There are three heads under which the case can be considered. First, whatever may be the result properly to be attributed to these transactions of the alleged transfer, it is contended that the vessels were sailing under the German flag on August 5, and that the German flag proves their nationality, so that they must be taken to be German, and subject to seizure or capture.

The law with regard to the effect of carrying the flag is perfectly clear, namely, that if a ship does sail under a particular flag, unless there are very special exceptions, she has elected to enjoy the protection of the State whose flag she flies, and she is regarded as a ship belonging to that State. Counsel for the Sugar Fodder Company said there was a distinction to be drawn between a capture at sea and a seizure in port; but it does not matter whether the flag was actually flying, whether it was hoisted, or whether it was at the mast when a ship was captured; the question is, what flag she was entitled to fly, and in my view there is no distinction on this part of the case between the case of a ship captured at sea and the case of a ship seized in port. The law as it has been understood, that the nationality of the ship depends upon the flag, was adopted in the Declaration of London. The belligerent parties agreed to the Declaration; and at the commencement of the Declaration will be found a statement that the rules laid down are substantially in conformity with the law of nations.

Art. 57 of the Declaration of London is this: "Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly." Not that which she is actually carrying, but that which she is entitled to fly. I will read the note by Monsieur Renault to this article, without pausing for the moment to consider whether it is binding. I will read it in order to express the view which I venture to entertain myself.

He says this: "The principle, therefore, is that the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly. It is a simple rule which appears satisfactorily to meet the special case of ships, as distinguished from that of other movable property, and notably of the cargo. From more than one point of view, ships may be said to possess an individuality, notably they have a nationality, a national character. This attribute of nationality finds visible expression in the right to fly the flag; it has the effect of placing ships under the protection and control of the State to which they belong; it makes them amenable to the sovereignty and to the laws of that State, and liable to requisition, should the occasion arise. Here is the surest test of whether a vessel is really a unit in the merchant marine of a country, and here therefore is the best test by which to decide whether her character is neutral or enemy. It is, moreover, preferable to rely exclusively upon this test, and to discard all considerations connected with the personal status of the owner."

The text makes use of the words, "the flag which she (the vessel) is entitled to fly"; that expression means, of course, the flag under which, whether she is actually flying it or not, the vessel is entitled to sail according to the municipal laws which govern that right.

The flag which these vessels were entitled to fly at the time of the seizure was the German flag, and they could not at that time, if they ever could during the war, supposing the transfer was valid, have the right to fly the British flag. Therefore, if there were no other point in this case, I think the fact that these vessels were flying the German flag is enough to make them droits of the Admiralty, liable to seizure in port as enemy vessels.

The second head under which the case may be dealt with is the one which has been discussed at the Bar by both sides, whether the transfers were valid; and I have come to the conclusion that they were not. If it were necessary to decide the point—I do not think it is, because if the transfers were incomplete that is a sufficient answer—I cannot bring myself to believe that the transfers were bona fide transfers of the ownership. The transaction, without going into details, may be briefly

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summed up as follows:—The German company said: "We understand you over here, and you understand us over there—our companies are intimately connected. We the Germans own nine-tenths of the shares in the British company, if war breaks out, whoever the belligerents may be, let these ships be called British ships." I think that is the real substance of the transaction. Much more than that is needed to transfer a vessel in transit when war has been declared, or when war is imminent. Naturally, these matters have often been considered in the Prize Courts; but I will not refer to more than two cases. The one case deals generally with the principles, although it is a case which affects cargo and not the ship, and the second case is one which affects the ship itself.

In *The Jan Frederick* (1) Lord Stowell says this: "That a transfer may take place in transitu has, I have already observed, been decided in two or three cases where there had been no actual war, nor any prospect of war, mixing itself with the transaction of the parties. But in time of war this is prohibited as a vicious contract: being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce of evading those rights beyond the possibility of detection. It is a road that, in time of war, must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed would use it only for sinister purposes, and with views of fraud on the rights of the belligerent. This, however, is not a contract made in time of war; and therefore an important question is raised, whether the contemplation of war would have the same effect in vitiating these contracts as actual war? It cannot be said that all engagements in the proximity of war, into which the speculation of war might enter, as, for instance, with regard to the price, would therefore be invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense. But if the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract that would not otherwise be entered into on the part of the seller, and this is known to be so done in the understanding

(1) (1804) 5 C. Rob. 128; 1 Eng. P. C. 434.

of the purchaser, though on his part there may be other concurrent motives, as in the case of the *Rendsborg*, such a contract cannot be held good, on the same principle that applies to invalidate a transfer in transitu in time of actual war. The motive may indeed be difficult to be proved, but that will be the difficulty of particular cases. Supposing the fact to be established that it is a sale under an admitted necessity arising from a certain expectation of war, that it is a sale of goods not in the possession of the seller, and in a State where they could not during war be legally transferred on account of the fraud on belligerent rights, I cannot but think that the same fraud is committed against the belligerent—not, indeed, as an actual belligerent, but as one who was, in the clear expectation of both the contracting parties, likely to become a belligerent—before the arrival of the property which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war—not, indeed, in either case from capture at the present moment when the contract is made, but from the danger of capture when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis. In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same animo fraudandi and are, in my opinion, justly subject to the same rule."

Now it is quite clear from the facts of the present case, and from what appears from the correspondence, that the origin of this transaction, which is said to have amounted to a transfer of the ships, was a desire to defeat the rights of a belligerent or belligerents when war was imminent, or had become an actual fact, and this passage from the judgment of Lord Stowell is as apt as it could possibly be to the circumstances of this particular case. In my judgment, it does not matter that England was not a belligerent at that time. The question is whether its origin and object were to try to get rid of the rights that any belligerent at that time would have.

The other case to which I will refer is the case of *The Baltica* (1), where the subject-matter was not the cargo, but the

(1) 11 Moo. P. C. 141; 2 Eng. P. C. 628.

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ship itself. The actual decision in that case was in favour of the validity of the transfer, but the general principles are fully dealt with by Lord Kingsdown in his judgment: "The general rule is open to no doubt. A neutral, while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties is not sufficient to change the property as against captors, as long as the ship or goods remain in transitu.

"With respect to these principles, their Lordships are not aware that it is possible to raise any controversy; they are the familiar rules of the English Prize Courts, established by all the authorities, and are collected and stated, principally from the decisions of Lord Stowell, by Mr. Justice Story, in his Notes on the Principles and Practice of Prize Courts, a work which has been selected by the British Government for the use of its naval officers, as the best code of instruction in the prize law. The passages referred to are to be found in pages 63, 64 of that work.

"The only question of law which can be raised in this case is not whether a transfer of a ship or goods in transitu is ineffectual to change the property, as long as the state of transitus lasts; but how long that state continues, and when, and by what means, it is terminated."

Then Lord Kingsdown discusses the grounds on which these principles have been based. He says: "There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right

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of capture by the belligerent Powers, until the voyage is at an end.

"The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that in one sense the ship and goods may be said to be in transitu till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner."

It is admitted in the case now before the Court that there was no delivery of the ships; in fact the captains of the vessels did not know anything about the alleged sale, and no instructions were received by them from the alleged purchasers in London until after the ships had been seized, and the captains, apparently, had been interned. I have stated the principles to be applied. I need not go into the exact details of the case to point out that nothing was arranged as to when the purchase-money was to be paid, or as to when the completion was to take place; and there is no proof as to whether the British company, or only Mr. Gunther himself, agreed to purchase. I have referred to the article in the Declaration of London dealing with the character of the vessel which is to be determined by the flag she is entitled to carry. The Declaration also contains two articles dealing with the transfer of an enemy ship to a neutral flag; one affecting a transfer alleged to be made before the outbreak of hostilities, and the other a transfer effected, or attempted to be effected, after the outbreak of hostilities.

Art. 55 is as follows: "The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed.

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There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

"Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits earned by, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages."

Art. 56 is this: "The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

"Provided that there is an absolute presumption that a transfer is void—

"(1.) If the transfer has been made during a voyage or in a blockaded port.

"(2.) If a right to repurchase or recover the vessel is reserved to the vendor.

"(3.) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled."

Before the Declaration of London, whatever alteration that may make in the law of nations, these artificial periods of time which have been agreed upon by the various nations, namely, thirty days and sixty days, of course, are not to be found in any decision of any particular Prize Court belonging to any country. They were adopted as convenient periods in the Declaration. I only refer to these articles in order to shew that the very basis of a valid transfer at sea, during war, or in anticipation of war, has been understood by the nations to be, first of all, that the transfer was not made in order to avoid the consequences to which an enemy vessel, alleged to be transferred, might be

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exposed by the action of any belligerent; and in the next place that, in any event, the transfer must be completed, not merely by letters and telegrams passing with or without all the terms of purchase, but by formal documents necessary to complete the title.

I have come to the conclusion without any doubt that this alleged transfer was not valid, and that, notwithstanding the transactions which took place between the German company and the English company, or between the two directors, these ships remained, for all purposes connected with the Prize Court, German ships. As questions were raised by counsel about when property passed by contracts, I will make this observation. The decision as to when property passes is often very difficult when dealing with municipal law. It depends upon fine technicalities; but the like technicalities have not been allowed to bind the decisions of the Prize Courts when transfers of property are attempted when war is actual or imminent. They have been treated as gossamer, which can be wiped entirely aside, because the Prize Court regards the essential qualities of a transaction, and tries to arrive at the realities of the case and decides in accordance with the real substance of a transaction.

There is a third branch of this case which I will just mention, but upon which I am not called upon to pronounce any decision. It is this: it must not be assumed that I should decide (even supposing I was in favour of the arguments of counsel appearing for the Fodder Company, on the first two heads, or, in other words, even if I came to the conclusion that the British company had become the purchasers), that this ship was immune from seizure. The two companies, the British and the German, were most intimately connected. The British company consisted of only five shareholders—Mr. Rudolph Schrader, who was a director in Germany, and who affected to sell this vessel to the English company—and his wife; Mr. Gunther, a German subject, and his wife; and the German company itself, the Norddeutsche Kraftfutter Gesellschaft, which owned 4500 out of 5000 or 5001 shares; and there was not a single shareholder in the English company who was of British nationality.

The policy of our municipal law is that no alien can own any

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share in a British ship. That is provided by the Merchant Shipping Act of 1894. It is no doubt the case that a company registered in this country under the Companies Acts has a separate entity; and that such a company can own a ship. Whether a company consisting entirely of aliens can own a ship is a question which probably has never arisen, and it has therefore never been decided. I am not sitting here dealing with the municipal law, and therefore I am not called upon to decide that question; but I do not want it to be assumed that the Prize Court could not say, looking at the reality of this thing, that, even if the transfer of the vessels were bona fide and had been completed, and were valid, these vessels ought to be regarded as German vessels under the circumstances. I am not deciding that question, but, inasmuch as the matter has been a little discussed, I have thought it fit to say as much as I have done.

In the result I decide against the claim of the company, and I make an order, as in *The Chile* (1), for the detention of the two ships, the *Tommi* and the *Rothersand*.

Bateson, K.C. In the case of the *Rothersand* I have to ask that the freight, in the hands of the collector of Customs, be paid into Court.

THE PRESIDENT. Yes.

Solicitor for the Crown: *The Treasury Solicitor.*
Solicitor for the Sugar Fodder Company: *W. R. J. Hickman.*

(1) [1914] P. 212.

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HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

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Oct. 7, 26,
29.

ADMIRALTY.

(In Prize.)

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(No. 140.)

Prize Court—Fishing Vessel—Coast Fishing Vessel—Immunity from Capture—Hague Convention, 1907, *No. XI., art.* 3—*Non-exemption of Deep-sea Fishing Vessel—Evidence admissible in Prize Cases—Prize Court Rules*, 1914, *Order* XV.

By art. 3 of the Hague Convention, No. XI., 1907, relative to certain restrictions on the exercise of the right of capture in maritime war, "vessels employed exclusively in coast fisheries . . . . together with their appliances, rigging, tackle, and cargo, are exempt from capture"; but, (apart from the question whether, in the existing war between Great Britain and Germany, the latter Power can rely upon the Convention), this immunity from capture will not extend to a German deep-sea fishing vessel engaged in a commercial enterprise forming part of the trade of the enemy country.

Under the Prize Court Rules, 1914, Order XV., a Prize Court is not bound to require the best official evidence of a capture, but may in its discretion make use of other information.

On August 4, 1914, war was declared between Great Britain and Germany, and on the following day, about 11.30 A.M., H.M.S. *Princess Royal* captured, some hundred miles from the nearest coast (Great Britain) and some 500 miles from her home port (Emden), the *Berlin*, a German drift fishing sailing cutter (W. Heine, master), of 110 metric tons, owned by the Emden Herring Fishing Company. She carried a crew of fifteen hands, and had on board 350 empty barrels, 100 barrels of salt, 50 barrels of cured herrings, 15 barrels of ship's stores, and two drift nets. It appeared from her log that she had been on a fishing voyage in the North Sea, and from a confidential report submitted to the President, and made by the commander of the cruiser, the Court gathered that, owing to the exigencies of the service, after capturing the vessel in about the locality mentioned above, he had given the *Berlin* into the charge of the steamship *Ailsa*, and by

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that vessel she was brought, on the early morning of August 6, into Wick Harbour, where the chief officer of Customs took possession, retaining her as prize captured at sea, and, on behalf of the Crown, application was now made for the condemnation and sale of the vessel and her cargo.

1914. Oct. 26. *Arthur Pritchard*, for the Crown. The Court will remember that this case stood over from October 7 for further evidence, and now, sufficient definite information as to the time and place of capture having been supplied, it may be assumed that the *Berlin* was handed over to the *Ailsa* on August 5 some ninety miles E.S.E. of Wick, and, therefore, the vessel was out of her home waters, and did not belong to the class of fishing vessel intended to be immune from capture as prize of war under art. 3 of the Hague Convention, No. XI., 1907. This article applies to "vessels employed exclusively in coast fisheries, or small boats employed in local trade," and is "founded on considerations of humanity to a poor and industrious order of men . . . . unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish": see the judgment of Gray J. in the American case of *The Paquete Habana and The Lola.* (1) See also *The Young Jacob and Johanna* (2); Westlake's International Law, vol. ii., p. 133; Hall's International Law, p. 447. In the work of a German international lawyer, Holtzendorff's Handbuch des Völkerrechts, vol. iv., p. 585, it is stated that vessels engaged in deep sea fishing are liable to capture as trading vessels. It would also seem to follow from s. 11 of the Herring Fisheries (Scotland) Act, 1867 (30 & 31 Vict. c. 52), dealing with the neighbouring locality, that this vessel, the *Berlin*, could not be deemed to be employed exclusively in "coast fishing," as, with reference to that expression, the coasts of Scotland are there defined as all bays, estuaries, arms of the sea, and all tidal waters "within the distance of three miles from the mainland or adjacent islands."

Oct. 29. SIR SAMUEL EVANS, PRESIDENT. In this case the Crown asks for the condemnation of the sailing ship, the *Berlin*,

(1) (1899) 175 U. S. 677; 189 U. S. 453; and Pitt Cobbett's International Law, part ii., War, p. 169.

(2) (1798) 1 C. Rob. 20.

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and her cargo as enemy property. No claim has been made in respect thereof; but it is, nevertheless, necessary to investigate the facts, and particularly to ascertain whether by international law the ship is immune from capture as a fishing vessel.

The *Berlin*, as appeared from the ship's papers, was a German fishing cutter of 110 metric tons, built in 1892, and manned by a crew of fifteen hands. She belonged to the port of Emden, and was owned by the Emden Herring Fishing Company. She had on board 350 empty barrels, 100 barrels of salt, 50 barrels of cured herrings, and ship's stores in 15 barrels. She carried one boat and had two drifts of nets, consisting of forty-two and forty-three nets each drift, two bush ropes, and a small steam boiler and capstan. The vessel, as appeared from her log, had been on a fishing voyage in the North Sea for a considerable time. From July 27 onwards she had been catching herrings, fishing in latitudes between 55° and 58°30 N., and in longitudes between one degree E. or W., and in depths of from 66 to 148 metres. Her position on August 1—2, as given in her log, was lat. 55°35 and long. 0°32, and on August 4—5, lat. 58°28 and long. 0°33. She was at these times, therefore, far out in the North Sea, at distances 100 miles, more or less, from the nearest coast, namely, Great Britain, and 500 miles, more or less, from her home port, and from the German coast. She was brought into the port of Wick in the early morning of August 6 by the steamship *Ailsa*, and given into the possession of the chief officer of Customs, who detained her as prize captured at sea.

There was no direct evidence in the legal sense, as used in our municipal Courts of law, of her capture by one of His Majesty's ships or of the place or time of her capture. It was reported to the officer of the *Ailsa* that she had been captured by H.M.S. *Princess Royal*, and by him that she was handed over by the commander to the *Ailsa* to be taken into Wick Harbour. I saw a confidential report made in the course of his official duty by the commander of H.M.S. *Princess Royal* of the capture, and it appeared that the exigencies of war rendered it necessary for him to request the *Ailsa* to take the captured vessel to Wick Harbour on his behalf. It appeared also that the capture took place at 11.30 A.M. on August 5. I should, apart from this, have

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presumed that the capture was not made until after war was declared on August 4 (11 P.M.). When the capture took place the vessel was in the North Sea in the position which I have approximately stated.

It would have been advisable, inasmuch as His Majesty's ship was unable to take the captured vessel to port, or to put a prize crew on board for the purpose, for the commander of the *Princess Royal* to enter the time and place of capture in the vessel's log, or to make a declaration in the presence of the vessel's master, lest objection might be made of the absence of direct legal evidence. But fortunately, in this Court, I am entitled to act upon other evidence or reliable information, and to draw inferences therefrom, upon which the Court may think it safe and just to act. Eminent judges (among them Lord Russell of Killowen) have commented upon the strict technicalities of some of the rules of evidence in our Courts of law; and admirable and wholesome as they are in the main, it would appear that some of them tend to shut out facts which might with advantage to the course of justice be made known to the Court. However this may be, the Prize Court is not bound by such confining fetters as our municipal Courts. Upon this subject Dr. Lushington laid down the practice as follows:

"With regard to the evidence to be produced in the Admiralty Courts with respect to blockades, and, indeed, I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered: and certainly we have in this case the licence of evidence of every kind and description which could well be offered to the consideration of the Court.

"I apprehend that this, so far as I know, the universal practice of the Court, was adopted for several reasons. First, because the Prize Court being, not a municipal Court, but a Court for the administration of public law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law.

"Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence, because this Court, having to

concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding, in transactions in which they were interested, proofs recognised by themselves.

"Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries.

"Fourthly, because, though the Court may receive all, it will form its own judgment, according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence, merely because it does not exclude it": *The Franciska.* (1)

I have stated the conclusions of fact to which I have come in the present case.

The question now remains whether this vessel, the *Berlin*, is immune from capture as a coast fishing vessel.

The history of the varying practices in this and other countries of exempting from capture in war vessels engaged in coast fishing up to the year 1899 has been given in the Supreme Court of the United States of America in the case of *The Paquete Habana and The Lola.* (2) The judgment of the Court was delivered by Gray J. It is full of research, learning, and historical interest.

As such an elaborate and complete résumé is available in that judgment, it would be a work of supererogation for me to attempt to perform a similar task.

The conclusions stated by Gray J., and which form the judgment of the majority of the Supreme Court, were as follows:

"This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilised nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing

(1) (1855) Spinks 287; 2 Eng. P. C. 346. (2) 175 U. S. 677.

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vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy ; nor when military or naval operations create a necessity to which all private interests must give way. Nor has the exemption been extended to ships or vessels employed on the high seas in taking whales or seals, or cod, or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. This rule of international law is one which Prize Courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own Government in relation to the matter."

Since the date when that judgment was pronounced the matter has been dealt with by Japan in its Prize Regulations, and in some of its Prize Court decisions, and it forms also the subject of an article in one of the Hague Conventions of 1907.

Art. 35 of the Japanese Regulations governing captures at sea, which came into force on March 15, 1904, provides as follows:

"All enemy vessels shall be captured. Vessels belonging to one of the following categories, however, shall be exempted from capture if it is clear that they are employed solely for the industry or undertaking for which they are intended:—

"(1.) Vessels employed for coast fishery.

"(2.) Vessels making voyages for scientific, philanthropic, or religious purposes.

"(3.) Lighthouse vessels and tenders.

"(4) Vessels employed for exchange of prisoners."

In the case of *The Michael* (1), heard in the Japanese Prize Court in 1905, which related to what was alleged to be a deep-sea fishing vessel, it was claimed that:

"The vessel, though a deep-sea fishing vessel, was not engaged in traffic forbidden in time of war, nor was she carrying contraband of war, and consequently being harmless should be

(1) Russian and Japanese Prize Cases (1913), vol. ii., p. 80.

released, in accordance with the intention which underlies the exemption from capture of small coastal fishing boats." Upon this the decision of the Court ran as follows: "The claimants also argued that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing boats; but the usage of international law by which small coastal fishing boats are not captured arises mainly from the desire not to inflict distress upon poor people who are not connected with the war, and the principle cannot be extended to a vessel like the *Michael*, which was the property of a company and engaged in deep-sea fishing."

The point was not raised in the Higher Prize (Appeal) Court. Similarly, in the case of *The Alexander* (1), the same Court pronounced as follows:

"It is also argued by the claimants that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing vessels, but the usage of international law by which small coastal fishing vessels are not captured arises mainly from the desire not to inflict distress on poor people who are not connected with the war, and clearly cannot be extended to a vessel like the *Alexander*, the property of a company, and, moreover, engaged in deep-sea fishing."

Upon appeal one of the grounds of appeal was:

"Again, the reasoning in the decision appealed from, that as the exemption from capture of small coastal fishing vessels chiefly arose from a desire not to inflict distress upon poor people unconnected with the war, it could not therefore be extended to a vessel like the *Alexander*, which was engaged in deep-sea fishing, shows that the claimants' point had not been understood. What the claimants desired was that the Imperial Prize Court should, in the light of recent developments in international law, not adhere to old usages, but create new precedents."

Upon which the Court adjudged in somewhat quaint fashion as follows:

"The appellants also desired that a new precedent should be established in the light of recent developments of international

(1) Russian and Japanese Prize Cases, vol. ii., p. 86.

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law by the exemption from capture of a vessel which, as in the present case, was engaged in deep-sea fishing. . . . . The appellants' request that a new precedent should be created by the exemption from capture of a deep-sea fishing vessel is nothing more than the simple expression of their hopes, and this ground of the appeal is therefore also devoid of substance."

I do not propose to make any pronouncement in the case now before the Court as to whether the German Empire or its citizens have in the circumstances of this war the right to claim the benefit of the Hague Conventions. But in order to shew how the doctrine with which I am now dealing has been treated by the nations with the progress of years and events, I refer to art. 3 of the Hague Convention, XI., 1907, which is as follows:

"Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, and cargo. This exemption ceases as soon as they take any part whatever in hostilities. The contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

In this country I do not think any decided and reported case has treated the immunity of such vessels as a part or rule of the law of nations: vide *The Young Jacob and Johanna* (1) and *The Liesbet van den Toll.* (2)

But after the lapse of a century I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations that fishing vessels plying their industry near or about the coast (not necessarily in territorial waters), in and by which the hardy people who man them gain their livelihood, are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves.

The foundation of the doctrine is stated by Hall (3) as follows:

"It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as

(1) 1 C. Rob. 20. (2) (1804) 5 C. Rob. 283.

(3) International Law (6th ed.), p. 446.

cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardships on their owners, is as a measure of general application wholly ineffective against the hostile State."

The rule is formulated by Westlake (International Law, Part II., War, p. 133) in these terms:—

"Coast Fisheries.—Immunity from capture on the ground of their being enemies or enemy property, but not from capture and condemnation on the ground of breach of blockade, is enjoyed by the men, boats, and tackle employed in coast fisheries, and their cargoes of fresh fish, including fish kept alive by contrivances on their way to market; so long as the men and boats are not engaged in any warlike employment—in which scouting, exchanging signals with the forces on their side, and carrying arms would be included—so long also as, in the opinion of the hostile Government or its naval commanders concerned, they are not likely to be engaged in any warlike employment"—and he adds: "If the opinion here referred to is only that of the naval commanders concerned, the Prize Court before which the captures are brought will have to release them unless the warlike intention of the captured is proved to its satisfaction; but if the captures were made in pursuance of a Government order, the Prize Court, in the absence of anything to the contrary in the constitution of the country, will be bound by such an order as emanating from the authority under which it sits."

It is obvious that in the process of naval warfare in the present day such vessels may without difficulty and with great secrecy be used in various ways to help the enemy. If they are, their immunity would disappear; and it would be open to the naval authorities under the Crown to exclude from such immunity all similar vessels if there was reason for believing that some of them were utilized for aiding the enemy. And this seems to be the sense in which the second paragraph of art. 3 of the Hague Convention referred to should be regarded.

As to the *Berlin*, I am of opinion that she is not within the category of coast fishing vessels entitled to freedom from capture; on the contrary, I hold that, by reason of her size, equipment, and voyage, she was a deep-sea fishing vessel engaged in a

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commercial enterprise which formed part of the trade of the enemy country, and, as such, could be and was properly captured as prize of war.

I therefore decree the condemnation of the vessel and cargo, and order the sale thereof.

Solicitor for the Crown: *The Treasury Solicitor.*

T. L. M.

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Oct. 19, 27.

[DIVISIONAL COURT.]

FENGL *v.* FENGL.

Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Evidence — Unstamped Document — Admissibility — Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-s.* 4.

In all applications to a Court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, based upon the husband's desertion, the date upon which the desertion is found to have commenced should be inserted in the finding of fact and should appear upon the face of the order.

The effect of the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14, sub-s. 4, is that an unstamped document, which requires a stamp, cannot be received in evidence, except in criminal proceedings, for any purpose whatever, including a collateral purpose.

APPEAL from the justices of the petty sessional division of Bakewell.

The order appealed from was dated July 24, 1914, whereby the justices adjudged that the appellant, Antonin Fengl, had deserted the respondent, Nellie Fengl, and ordered that the custody of one of the children of the marriage should be committed to the respondent, and also ordered the appellant to pay 1*l.* a week to the use of the respondent, and the costs of the summons.

From this order the husband appealed on various grounds, and among others on the ground that the justices on the hearing of the complaint upon which the order was made wrongfully rejected certain evidence tendered on behalf of the appellant, and that the decision or order appealed from was erroneous in law.

The rejected evidence consisted of a document, which was said to be an agreement for separation between the parties, dated

April 8, 1914, and the ground of the rejection was that it was unstamped.

Inskip, K.C., for the appellant. It is submitted that the document ought to have been looked at for the collateral purpose of disproving the case which the wife was trying to set up, namely, that of desertion by her husband. The chief authority on the point of admissibility is *Matheson* v. *Ross* (1), and in *Ponsford* v. *Walton* (2) an unstamped deed was admitted for a collateral purpose. [He also referred to the Stamp Act, 1891 (3), and the comments thereon in Chitty's Statutes, which he submitted went too far.]

W. O. Willis, for the respondent, supported the decision and order of the justices.

Oct. 27. SIR SAMUEL EVANS, PRESIDENT. This is an appeal from the decision of the justices sitting at Bakewell, in the county of Derby, on July 24, 1914, when they found, after reserving their decision, that the defendant (the present appellant) had deserted his wife. A point of law was raised in regard to the admissibility in evidence of an unstamped document which was said to be an agreement between husband and wife for living separately.

The first point we have to determine is whether there was evidence fit to entitle the justices to say that in fact this man deserted his wife.

The justices found that there was desertion in fact, and I am not able to say that they were misdirected in law in coming to that finding.

I think it would be advisable in all these cases if they would state in the finding of fact and insert in the order drawn up afterwards the date on which they find that desertion commenced.

There are two important dates, namely, April 4 and 9, 1914, and they do not tell us on which date they find desertion; probably they found it was on the 4th, as to which there was evidence that the man turned his wife out of the home. [The

(1) (1849) 2 H. L. C. 286. (2) (1868) L. R. 3 C. P. 167.
(3) 54 & 55 Vict. c. 39.

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learned President read the letters and referred to the evidence, which was in some respects contradictory.]

It is said that some time before there had been a reconciliation between the parties and that they were living separately under an agreement so to do, before the proceedings were taken. In order to prove that, some viva voce evidence was given and a document was tendered in evidence. The justices were advised that the document could not be received because it was not stamped. It has been argued here that, although not stamped, inasmuch as it was not tendered in evidence for the purpose of enforcing it, but to prove some collateral fact, the non-stamping of the document is not a valid objection. Some of the older cases were referred to, the chief of them being *Matheson* v. *Ross.* (1) But it is clear that if the document was what it was said to be, it would have gone to prove one of the main facts in issue between the parties, namely, that the separation was by agreement.

Whatever the law was before 1891, I am of opinion that this agreement was not admissible. Since the cases referred to were decided, the Stamp Act, 1891, was passed, which provides (2) that ". . . . an instrument executed in any part of the United Kingdom, or relating, ... to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

That is very wide. That provision in the Act of 1891 appears to have been moulded upon s. 54 of the Stamp Act, 1870 (3), which has been held to exclude unstamped documents even if tendered only for collateral purposes.

But in my opinion the tendering of this document was for the purpose of proving something more than a collateral issue, namely, that the parties were living separately by agreement, which was an essential fact in issue in the case.

Notwithstanding the rejection of the tendered agreement, it was open to the appellant to prove the fact of a voluntary

(1) 2 H. L. C. 286.

(2) 54 & 55 Vict. c. 39, s. 14, sub-s. 4.

(3) 33 & 34 Vict. c. 97.

separation by verbal evidence: it was not necessary to prove it by any document. Some evidence was given upon this matter. But in my view the justices had sufficient evidence before them to come to the conclusion at which they arrived, and to hold that there was no voluntary agreement between the parties to live separately. We cannot disturb their finding or decision.

The appeal will therefore be dismissed with costs.

BARGRAVE DEANE J. I agree.

Appeal dismissed.

Solicitors for appellant (husband): *Guscotte, Wadham, Tickell & Co., for Goodwin & Cockerton, Bakewell.*

Solicitors for respondent (wife): *H. G. Campion & Co., for Ralph J. Watts, Manchester.*

H. D. G.

[DIVISIONAL COURT.]

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BRYANT *v.* BRYANT.

Husband and Wife—Aggravated Assault—Offences against the Person Act, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 43—*Conviction insufficiently describing Offence—Summary Jurisdiction (Married Women) Act,* 1895 (58 *&* 59 *Vict. c.* 39), *s.* 8—*Separation Order—Appeal.*

A husband having been convicted by justices of an aggravated assault upon his wife within the meaning of s. 43 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), was there and then served with a summons, under s. 8 of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), returnable at once, and the justices thereupon made an order for a separation:—

Held, that there was no appeal to this Court from the conviction, and that the appeal under s. 11 of the Act of 1895 against the separation order failed and must be dismissed with costs.

APPEAL from the justices of the petty sessional division of Ploughley, sitting at Bicester, in the county of Oxford.

The order appealed from was dated July 31, 1914, by which it was ordered that the respondent, Ada Currie Bryant, should be no longer bound to cohabit with the appellant, the Reverend

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William Bryant, on the ground that the appellant had been summarily convicted of an aggravated assault upon the respondent within the meaning of s. 43 of the Offences against the Person Act, 1861.

The grounds of the appeal were :—

(1.) That the appellant was not guilty of the said offence.

(2.) That the said conviction was against the weight of evidence.

(3.) That the said conviction was bad in law.

(4.) That the said justices in making the said order exceeded their jurisdiction and the said order was invalid.

The order and conviction upon which documents the appeal turned were in the following terms :—

"In the County of Oxford. Petty Sessional Division of Ploughley.

"Before the Court of Summary Jurisdiction sitting at the Magistrates' Chambers at Bicester in the County of Oxford, the thirty-first day of July, 1914, William Bryant, of Stoke Lyne in the county aforesaid, Clerk in Holy Orders (hereinafter called the defendant), having been this day summarily convicted before this Court of an aggravated assault upon Ada Currie Bryant his wife within the meaning of section 43 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), a copy of which said conviction is hereunto annexed, and the defendant having been duly summoned to show cause why an order should not be made upon him under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), upon the application of Ada Currie Bryant his wife, by summons duly issued by leave of the Court, and returnable immediately upon the said summary conviction of the defendant before this Court of an aggravated assault upon his said wife within the meaning of section 43 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100) :

"It is this day ordered that :—

"1. His said wife be no longer bound to cohabit with the defendant; and that

"2. The defendant do pay seven shillings for the costs of the Court, and shall pay to his wife the sum of one pound one shilling for her costs."

"In the County of Oxford. Petty Sessional Division of Ploughley.

"Before the Court of Summary Jurisdiction sitting at the Magistrates Chambers at Bicester, the 31st day of July, 1914. William Bryant of Stoke Lyne in the county of Oxford, Clerk in Holy Orders (hereinafter called the defendant), is this day convicted before this Court for that he on the nineteenth day of July, 1914, at the parish of Stoke Lyne in the said county, unlawfully did assault and beat one Ada Currie Bryant his wife, contrary to section 43 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100).

"And it is adjudged that the defendant do for his said offence forfeit and pay to the clerk of this Court, at Bicester, the sum of ten pounds, and do also pay the said Ada Currie Bryant the sum of twelve shillings for costs.

"And it is ordered that the said sums be paid forthwith.

"And if default is made in payment according to this adjudication and order it is adjudged that the defendant be imprisoned in His Majesty's prison at Oxford, there to be kept for the space of two months, unless the said sums, and all costs and charges of his commitment to the said prison, be sooner paid."

Bowen, K.C. (*Hughes* with him), for the appellant (husband). The justices had no jurisdiction on the facts before them to convict the husband of an aggravated assault. Before they could so convict under s. 43 of the Offences against the Person Act, 1861 (1), they ought to have considered whether the matter could not have been dealt with under s. 42 of that Act.

The conviction is bad on the face of it, because it does not state the facts constituting the offence.

The mere oral decision of the justices is not a conviction; the conviction is their order drawn up in writing: Summary Jurisdiction Act, 1879 (2), s. 39, sub-s. 1; *Smith* v. *Moody* (3); *In re Rice*. (4)

The conviction ought to state sufficient facts to shew that it could not, in fact, be made under s. 42.

The husband could not have asked the justices to state a case:

(1) 24 & 25 Vict. c. 100.
(2) 42 & 43 Vict. c. 49.
(3) [1903] 1 K. B. 56.
(4) (1873) 7 I. R. C. L. 74.

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Manders v. *Manders*. (1) That decision shews that the only mode of questioning the order is to come to this Court under s. 11 of the Summary Jurisdiction (Married Women) Act, 1895.

The order is bad; the justices annexed a document which is not a proper conviction in point of law.

Looking upon the order and considering its terms, it is clear that the justices tried to give themselves jurisdiction. There was no evidence before them of any conviction for an aggravated assault.

W. O. Willis, for the respondent (wife). The order is right in form. This appeal does not lie, so far as the conviction is concerned. *Lewin* v. *Lewin* (2) was a decision under the Matrimonial Causes Act, 1878 (3), which differs in one material respect from the Act of 1895. Under the old Act, the wife had to shew that it was unsafe for her to continue to live with her husband: now, under s. 8 of the Act of 1895, that is no longer necessary. One of the cases under the earlier Act is *Goodwin* v. *Goodwin*. (4)

On the facts of the case, the justices saw the parties, and had ample evidence before them.

This appeal does not lie on the first three heads of the notice of appeal, and under the fourth there was ample jurisdiction.

Bowen, K.C., in reply.

SIR SAMUEL EVANS, PRESIDENT. This is an appeal from the order of justices made under the Summary Jurisdiction (Married Women) Act, 1895 (5), in accordance with the procedure set out in s. 8 of that Act.

The appellant was summoned for assaulting his wife, and on July 31, 1914, the justices in his hearing convicted him of an aggravated assault, and inflicted upon him a fine of 10*l.*, or in the alternative sentenced him to imprisonment for two months. The conviction was under s. 43 of the Offences against the Person Act, 1861. (6) Under s. 42 the justices could not have fined him more than 5*l.* They in fact inflicted a fine of 10*l.*, as I have

(1) [1897] 1 Q. B. 474.
(2) [1891] P. 254.
(3) 41 & 42 Vict. c. 19.
(4) (1887) 51 J. P. 583.
(5) 58 & 59 Vict. c. 39.
(6) 24 & 25 Vict. c. 100.

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already said. Immediately after the conviction for an aggravated assault, a summons was issued and made returnable there and then, asking that an order should be made under the Act of 1895 that the wife should have the right to live separate and apart from him. Upon the hearing of that summons the justices made an order that the wife be no longer bound to cohabit with her husband and that he should pay a sum for costs.

An appeal is now brought under s. 11 of the Act of 1895; but under that section the appeal is only against the order made upon the second summons. Mr. Bowen seeks to impeach the conviction. There is no appeal to this Court against the conviction for an aggravated assault: there may be no appeal at all. But whether there is an appeal to quarter sessions or not, there is no appeal to this Court from the conviction. The conviction therefore stands. Mr. Bowen says that the conviction is bad on the face of it. I express no opinion upon it, but it contains a statement that it was made under s. 43 of the Act of 1861. But the order of the justices is complete in itself and a copy of the conviction need not have been exhibited at all. The order of the justices is as follows: [His Lordship read the order.]

The order is right and correct in form, and that particular form is not impeached. On what are called the merits, counsel tentatively asked this Court to say that the justices were not right in having pronounced the appellant guilty of an aggravated assault.

I am not going into the circumstances which were given in evidence, but it is abundantly clear that the justices were justified in coming to the conclusion that this was an aggravated assault. The man makes his wife kneel down; he hits her on the side, according to her, four times, according to him he smacks her side fairly hard four times. He draws out a revolver and says to her "You know what this is for." No one else was in the house. He goes outside, locking her in the room. He gives three shots from the revolver, and she is so frightened that she jumps out of the window, a distance of fourteen feet.

The justices were not only justified in holding this to be

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an aggravated assault; they could not properly have held otherwise.

The appeal must be dismissed with costs.

BARGRAVE DEANE J. I agree.

Appeal dismissed.

Solicitors for appellant: *Julius Edwards & Thomas, for Tyrwhitt & Marshall, Oxford.*

Solicitors for respondent: *Andrew Walsh, Gray & Rose, Oxford.*

H. D. G.

Not followed. LAND *v.* LAND. [1949] 2 All E.R. 218.

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Not followed. LAND *v.* LAND. [1949] P. 405

[DIVISIONAL COURT.]

HOPKINS *v.* HOPKINS.

Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Husband's Appeal—Effect of Withdrawal of Previous Summons—Technical Objection taken in Court below—Appeal allowed.*

An order of justices permitting a summons under the Summary Jurisdiction (Married Women) Act, 1895, to be withdrawn does not, where such withdrawal was conditional, dispose of the right of a wife on similar facts to take further proceedings.

APPEAL from order of justices sitting at Highgate on July 22, 1914, made upon a complaint and summons by the wife, alleging persistent cruelty by her husband and that he thereby caused her to leave him.

The facts sufficiently appear from the judgment.

Acton Pile, for the appellant. The justices had no jurisdiction. The later summons was in precisely the same terms as the earlier one, and the matter was therefore res judicata.

There has been no actual decision on this point, but *Pickavance* v. *Pickavance* (1), although decided on another point, was a very strong expression of the considered opinion of the Court, and it was commented upon favourably in *Stokes* v. *Stokes*. (2) It is understood that the case of *Davis* v. *Morton* (3) was relied on in the Court below, but that case is not against the appellant.

(1) [1901] P. 60. (2) [1911] P. 195.

(3) [1913] 2 K. B. 479.

In an Irish case, *The King* (*McDonnell*) v. *The Justices of County Tyrone* (1), the difference between criminal and civil jurisdiction was discussed, and *Pickavance* v. *Pickavance* (2) was dealt with and approved in the judgments of the Court.

Beddington, for the respondent. This case is not covered by *Pickavance* v. *Pickavance*. (2)

SIR SAMUEL EVANS, PRESIDENT. In this case there appear to have been quarrels between the husband and wife for some time. I observe from the notes that the wife stated that about eighteen months before she had summoned her husband for "the same sort of thing," and that that summons had been dismissed, the Bench saying that the parties had better try and settle their differences out of Court.

On April 11, 1914, a summons was issued alleging persistent cruelty whereby the husband had caused the wife to leave and live separate and apart from him. That summons was returnable on April 22 and it actually came on for hearing on May 20. The wife went into the witness-box, and in the end the summons was marked "withdrawn." It is not denied here that the persistent cruelty which was the foundation for that summons was exactly the same as the alleged persistent cruelty referred to in the subsequent summons of July 4, 1914, on the hearing of which it was argued before the justices that the matter was res judicata.

The facts in this case are very similar to those in *Pickavance* v. *Pickavance*. (2)

The decision in that case is a very narrow one; but an expression of opinion, both on the part of the President (Sir Francis Jeune) and Barnes J., after the Court had reserved their judgment in order to consider that particular question, seems to go the length of saying that in every case a withdrawal puts an end to the summons.

In *Stokes* v. *Stokes* (3) we pointed out in this Court what the actual decision in *Pickavance* v. *Pickavance* (2) was; but we neither approved nor disapproved of the expression of opinion referred to.

(1) [1912] 2 I. R. 44.

(2) [1901] P. 60.

(3) [1911] P. 195.

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Subsequently to that, *Pickavance* v. *Pickavance* (1) was dealt with in the Irish Court in the case of *The King* (*McDonnell*) v. *The Justices of County Tyrone* (2), where the Lord Chief Baron in the course of his judgment said: "*Pickavance* v. *Pickavance* (1) when carefully considered will be found not to be an authority for the defendant. The real ratio decidendi there was that the complaint acted upon by the justices in making the order appealed from was the second one, and that 'that was out of time'—in other words, that, by reason of the expiration of six months from the cause of complaint, the jurisdiction of the justices to make the order appealed from had ceased. As a decision therefore it is not in point here. However, the very eminent judges who composed the Court are reported to have expressed the opinion that the withdrawal of a summons by leave of the Court in these cases involved 'the obvious effect that the complaint upon which the summons was founded necessarily falls to the ground.' It is said that the words 'in these cases' mean and include all cases before justices, and that the words I have cited lay down a general rule as to the administration of criminal laws by justices. I desire to say that in cases such as that of *Pickavance* v. *Pickavance* (1), viz., cases of separation between husband and wife, in which the question of condonation so frequently arises, the withdrawal of a summons may have the effect attributed to it. The introduction into the second sentence of Sir Francis Jeune's judgment of the words 'in this case,' which limit his opinion as to the effect of the withdrawal of a summons to that particular case, and the form of the head-note, seem to indicate a desire to restrict the effect of some more general expressions in the judgment.

"If, however, we apply the principle laid down in that decision to the withdrawal of any summons for a criminal offence, we would impose a fetter upon the administration by justices of the criminal law, which derives no support either from statute or from analogy in common law; and to do so would, in my opinion. be opposed to the long line of authorities which define and limit the application of the common law pleas of 'autrefois convict' and 'autrefois acquit.'

"To support such a momentous decision, Sir Francis Jeune,

(1) [1901] P. 60.

(2) [1912] 2 I. R. 44, 48.

in giving judgment in *Pickavance* v. *Pickavance* (1) in 1900, says, 'There seems to be no direct authority on this point'; and we have not been referred to any later case which the industry of counsel may have found.

"Under these circumstances, notwithstanding the unfeigned respect I feel for Lord Gorell and the late Sir Francis Jeune, I should have found the greatest difficulty in giving to *Pickavance* v. *Pickavance* (1) the broad extension which, in my opinion, would be necessary to render it applicable here, even if there were not another vital circumstance which distinguishes it from the present case. There is, however, that vital difference . . . ."

I respectfully agree with all that the learned Chief Baron said there.

The case of *Pickavance* v. *Pickavance* (1) has been considered not only in Ireland, but here also in *Davis* v. *Morton*. (2)

Upon the whole I think we ought in cases between husband and wife not to depart from the opinion solemnly expressed by our two eminent predecessors. But it is not every withdrawal of a summons that necessarily disposes of the right of a wife on similar facts to take further proceedings. The withdrawal might be on conditions. In this case the justices seem to have been under a complete misapprehension when they say the first summons was adjourned. It was withdrawn and it is so marked. It was withdrawn absolutely, and without conditions.

In these circumstances we are of opinion that the last summons should have been dismissed.

The appeal ought to prevail, and is allowed.

BARGRAVE DEANE J. I agree that the appeal ought to be allowed.

In my view the case of *Pickavance* v. *Pickavance* (1) may be relied upon as a very valuable decision. So far as causes of complaint between husband and wife under this particular Act are withdrawn unconditionally, husbands ought to be for ever relieved from the same cause of complaint under this Act. I do not say that a wife should not be able to bring up here, to obtain relief, coupled with adultery, charges which may have been

(1) [1901] P. 60. [The report cited reads, at p. 63, "*the* point."]

(2) [1913] 2 K. B. 479.

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withdrawn in a Court of summary jurisdiction; but such withdrawal should, in my opinion, be an estoppel from bringing up again the same cause of complaint before the justices.

Appeal allowed.

Solicitor for appellant: *James B. Lander.*
Solicitors for respondent: *Forbes & McLean.*

H. D. G.

THE END.

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See SHIPPING. 7.

—— Tug and tow—Tow and third ship in collision—Tug and third ship to blame—Division of loss - - - - 25
See SHIPPING. 8.

COLLISIONS AT SEA (REGULATIONS FOR PREVENTING), art. 19 - - 40
See SHIPPING. 7.

—— arts. 19, 21, 27 - - - . - 84
See SHIPPING. 6.

COMPULSORY PILOTAGE—Shipping.
See under SHIPPING.

CONDONATION — Adultery of petitioner — Husband's petition—Discretion of the Court—Decree nisi - - - 100
See DIVORCE. 5.

CONSENT ORDER — Divorce — Decree — Permanent maintenance—Power to vary—Estoppel - - - - - 245
See DIVORCE. 2.

COSTS—Divorce—Decree nisi—Intervention by stranger — Liability of intervener to give security for wife's costs - 122
See DIVORCE. 10.

—— Divorce—Practice—Wife's costs—Amount secured—Limit—Duration of hearing or trial—Application for further security—Full costs—Discretion of judge 116
See DIVORCE. 1.

—— Probate—Conduct leading to investigation—Power of Court—Costs of all parties ordered to come out of legacies of successful parties - - - - 129
See PROBATE. 1.

—— Shipping—Collision—Defence of compulsory pilotage with denial of negligence
See SHIPPING. 5. 46

COUNSEL — *Counsel's Fees — Honorarium and not Debt—Non-Liability to Attachment in Hands*

COUNSEL—*continued.*
of Solicitor—Judgment Debt—Garnishee Order—Invalidity.
Fees owing to counsel are not "debts" and cannot be attached or garnisheed as such.
Where a wife had commenced proceedings for a divorce against her husband, who was a barrister, and had obtained an order for payment of alimony pendente lite, and that order had not been obeyed :—
Held, that fees due to the husband, which had been received by a firm of solicitors and not paid over, were not debts and could not therefore be attached under a garnishee order obtained by the wife against the solicitors.
In re H. & C. Hall (1856) 2 Jur. (N.S.) 1076, and *Ex parte Colquhoun, In re Clift* (1890) 38 W. R. 688, explained. WELLS *v.* WELLS
C. A. 157

CRIMINAL LAW—Probate—Legatee convicted of manslaughter of testator—Forfeiture of right to take under will—Public policy - - - - - - - **1**
See PROBATE. 2.

CROSSING RULES — Shipping — Collision—Single foreign ship and squadron of warships—Board of Trade Notice to Mariners, 1897 - - - - **84**
See SHIPPING. 6.

—— Shipping—Collision—Steam vessel coming out of dock in the Mersey — Steam vessel moving in the river—The crossing rule (art. 19) of the regulations for preventing collisions at sea—Rules of good seamanship - - - - **40**
See SHIPPING. 7.

CROWN—Prize Court—Claims of shareholders, necessaries men, and mortgagees — Bounty of Crown - - - **218**
See PRIZE COURT. 4.

DAMAGE—Shipping—Collision.
See under SHIPPING.

DEBT—Counsel's fees — Honorarium and not debt—Garnishee order—Invalidity **157**
See COUNSEL.

DECLARATION OF LONDON, arts. 55, 56, 57
See PRIZE COURT. 3. **251**

DECREE NISI — Divorce—Discretion of the Court - - - - **100, 104, 122**
See DIVORCE. 5, 7, 10, 11.

DESERTION—Divorce—Summary Jurisdiction (Married Women) Act, 1895—Evidence—Unstamped document — Admissibility - - - - - - - **274**
See DIVORCE. 3.

DISCOVERY — Divorce — Practice — Order for affidavit of documents to be filed by guardian ad litem - - - **110**
See DIVORCE. 4.

DISCRETION—Divorce—Costs—Wife's costs
See DIVORCE. 1. **116**

DISCRETION—*continued.*
—— Divorce — Decree nisi—Discretion of the Court - - - - **100, 104, 122**
See DIVORCE. 5, 10, 11.

DISSOLUTION—Marriage—Divorce.
See under DIVORCE.

DIVORCE — *Costs — Practice — Wife's Costs — Amount secured—Limit—Duration of Hearing or Trial—Application for Further Security—Full Costs—Discretion of Judge.*
At the trial of a husband's petition for divorce it appeared that a sum, estimated by one of the registrars, had been secured to meet the wife's costs of the hearing. Application was made at the end of the first day that further security should be given, in view of the hearing lasting more than one day. This application was acceded to by the presiding judge.
At the conclusion of the case, which resulted in the husband's favour, the "usual order" for wife's costs was made ; and the wife's solicitors thereupon carried in a full party and party bill of costs and proceeded to taxation. Objection was then taken by the husband's solicitor to all items down to the adjournment of the Court at the end of the first day of the hearing, including all items subsequent thereto and which would form part of the costs had the hearing terminated on the first day, in so far as the total allowed in respect of these items exceeded the amount actually secured before the hearing :—
Held, that the objection could not be sustained and that the registrar was right in taxing the bill as between party and party, in accordance with the principle laid down by the Court of Appeal in *Robertson* v. *Robertson* (1881) 6 P. D. 119.
There was, however, nothing in that case or in the present decision which was to be taken as limiting in any degree the discretion as to costs vested in and exercisable by the judge presiding at the hearing or trial of a matrimonial suit, by statute, and by the Divorce Rules. PALMER *v.* PALMER AND STOCKLEY
Sir Samuel Evans, President 116

2. —— *Decree — Permanent Maintenance—Order for Payment to Wife during Life—Consent Order—Power to vary—Estoppel—Matrimonial Causes Act*, 1907 (*7 Edw. 7, c.* 12), *s.* 1, *sub-ss.* 1, 2.
A wife, having obtained a divorce from her husband in 1908, petitioned for an order for permanent maintenance. The registrar reported that the parties had agreed that the amount to be paid by way of maintenance should be 90*l.* a year for the wife and 30*l.* a year for the only child of the marriage until she should attain the age of twenty-one years, and the registrar submitted that the husband should be ordered to pay the agreed amount "to the wife for her life." An order was accordingly made in that form. In 1913 the wife petitioned for an increase of maintenance, and the husband presented a cross-petition for a decrease. At the hearing before the registrar the wife withdrew her petition and contended that there was no power to vary the consent order. The registrar

so held, and the President affirmed his decision and dismissed the husband's petition :—

Held, on appeal, that having regard to s. 1 of the Matrimonial Causes Act, 1907, an order for payment to the wife "during her life" could only be made by consent, and the order being so made could not be varied ; and that the wife was not estopped from relying on the order as a consent order by reason of her having presented and withdrawn a petition for an increase of maintenance. MAIDLOW *v.* MAIDLOW

C. A. 245

3. —— *Desertion — Practice — Evidence—Unstamped Document—Admissibility—Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39)—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 14, *sub-s.* 4.

In all applications to a Court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, based upon the husband's desertion, the date upon which the desertion is found to have commenced should be inserted in the finding of fact and should appear upon the face of the order.

The effect of the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14, sub-s. 4, is that an unstamped document, which requires a stamp, cannot be received in evidence, except in criminal proceedings, for any purpose whatever, including a collateral purpose. FENGL *v.* FENGL

Div. Ct. 274

4. —— *Discovery of Documents—Guardian ad litem—Practice—Husband alleged to be of Unsound Mind—Suit for Nullity—Cross-Petition for Restitution—Order for Affidavit of Documents to be filed by Guardian ad litem.*

The Court has power to order the guardian ad litem of a party in a matrimonial suit to file an affidavit of documents. PASPATI *v.* PASPATI

Sir Samuel Evans, President 110

NOTE.—See also a report of *Ingram* v. *Little* as a note at p. 115 of the above case.

5. —— *Husband's Petition — Adultery of Petitioner — Condonation — Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Discretion of the Court—Decree Nisi.*

Where, in a petition for dissolution of marriage by a husband who had been guilty of adultery during the marriage, the adultery was fully disclosed to the Court and had also been disclosed to the wife and condoned by her, the Court (Bargrave Deane J.) exercised its discretion in favour of the husband and granted him a decree. HABRA *v.* HABRA AND HABAL

Bargrave Deane J. 100

6. —— *Restitution of Conjugal Rights — Non-compliance with Decree—Periodical Payments—Matrimonial Causes Act*, 1884 (47 *&* 48 *Vict. c.* 68)—*Principles governing Orders for Periodical Payments.*

An order for periodical payments under the Matrimonial Causes Act, 1884, is a personal order against the respondent and is to be enforced in the same manner as in the case of an order for permanent alimony made after a decree of judicial separation.

Such periodical payments are made by analogy to alimony, to depend upon the means of the parties, and the Court has power, under s. 4 of that Act, to vary or modify any order for such periodical payments, or to suspend temporarily and to revive the order either wholly or in part, as the Court may deem just.

Notwithstanding the time limited by the Court for restitution of conjugal rights, the parties may at any moment resume cohabitation, and, in the event of any such resumption, an order for periodical payments previously obtained ought thereupon to be terminated or suspended.

The Legislature did not contemplate that periodical payments ordered to be made under the Act of 1884 should be more permanent or fixed, or should extend for a longer period, than the alimony obtainable if the further relief provided for by the Act, namely, judicial separation, were obtained.

The faat that the Court is empowered by the Act of 1884 to order periodical payments thereunder to be secured does not alter the character of the order or of the payments ; the security being only for "such periodical payments," that is to say, payments expressly made variable and alterable by s. 4 of the Act. TANGYE *v.* TANGYE.

Sir Samuel Evans, President 201

7. —— *Restitution of Conjugal Rights — Service of Citation and Decree out of the Jurisdiction—New Divorce Rules.*

In a suit for restitution of conjugal rights, where it appears from the petition that the parties to the suit are domiciled in England at the date thereof ; or that they had a matrimonial home in England at the time when cohabitation ceased ; or that they were both resident in England at the time of the institution of the suit, the citation and sealed copy of the petition may be served either within or without His Majesty's dominions ; and when a suit for restitution of conjugal rights has been duly instituted and a decree has been made therein, such decree may be served on the respondent either within or without His Majesty's dominions. PERRIN *v.* PERRIN. POWELL *v.* POWELL

Sir Samuel Evans, President 135

8. —— *Restitution of Conjugal Rights — Service out of the Jurisdiction — Appearance under Protest—Act on Petition—Petition dismissed—Practice.*

The amendment of the law effected by the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), relates to matters subsequent to the decree : the essence of the suit and of the decree for restitution of conjugal rights remains the same, but its consequences and effects are different.

Dicks v. *Dicks* [1899] P. 275 dissented from.

No power is given either by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 42, or by any other section or Act, to serve a citation and petition for restitution of conjugal rights beyond the jurisdiction of the Court.

Firebrace v. *Firebrace* (1878) 4 P. D. 63 approved and followed.

Bateman v. *Bateman* [1901] P. 136 criticized

DIVORCE—*continued.*

Where service of the citation and of a sealed copy of a petition for restitution of conjugal rights had been effected abroad, an order setting aside the service was made.

Whether, in a case where service is duly and properly effected, and where no question arises as to the jurisdiction of the Court in pronouncing a decree for restitution of conjugal rights, such decree can be served out of the jurisdiction, *quære.*

Where neither party to a marriage was domiciled or resident within the jurisdiction, and their only connection with this country at the date of their marriage was that they came over here for one day for the purpose of being married, and their only matrimonial residences were abroad, the Court cannot decree restitution of conjugal rights.

There is no authority, either in the Ecclesiastical Courts before 1857, or in this Court since the Matrimonial Causes Act, 1857, was passed, for pronouncing a mere declaratory judgment, in a case which does not come within the scope of the Legitimacy Declaration Act, 1858.

The mere fact that the marriage was celebrated in England, and that the petitioner purported to be residing here at the date of the institution of proceedings, cannot give the Court power to give a declaratory judgment as to the validity of the marriage.

Rules of the Supreme Court, Order XXV., r. 5, does not apply to such a case, and it can confer no jurisdiction on the Divorce Division to make a declaration as to the validity of such a marriage. COUNTESS DE GASQUET JAMES *v.* DUKE OF MECKLENBURG-SCHWERIN
Sir Samuel Evans, President 53

9. —— *Settlements—Variation of—Allowance to Guilty Wife—Dum casta et sola vixerit—Dissolution of Marriage.*

Upon an application for variation of marriage settlement by a husband who had obtained a decree for dissolution of his marriage it appeared that the petitioner and the respondent were married in 1902. The latter had no means, but the husband by an ante-nuptial settlement assigned to trustees certain furniture and a moiety of the residuary estate under his mother's will upon trusts under which the respondent took the first life interest. The decree was made absolute in November, 1913, and the husband then presented his petition for variation of the settlement by extinguishing all the rights of the respondent thereunder. It appeared that the income of the settled property amounted to 137*l.* a year, and the petitioner refused to make any allowance. Bargrave Deane J. made an order that the wife's interest in the settlement should be extinguished, except that the trustees thereof should pay to her 30*s.* a week for life, and refused to insert a dum casta clause.

The petitioner appealed and contended that the weekly allowance was excessive and that the clause ought to be inserted :—

Held, that the allowance must be reduced to 1*l.* a week, and that a dum casta clause must be inserted. OLLIER *v.* OLLIER - - **C. A. 240**

DIVORCE—*continued.*

10. —— *Wife's Petition—Decree Nisi—Intervention by Stranger—Order for Trial of Issue as to Wife's Adultery—Liability of Intervener to give Security for Wife's Costs—Jurisdiction—Divorce and Matrimonial Causes Act*, 1860 (23 *&* 24 *Vict. c.* 144), *s.* 7—*Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 2.

A husband's petition for divorce was met by a cross-petition for divorce by the wife. The husband's petition being unsupported by evidence was dismissed, but a decree nisi was granted to the wife upon her petition. Before the decree was made absolute, upon the intervention of a stranger, an order was made for trial of an issue as to the wife's adultery, no terms as to costs being asked for or imposed upon the intervener. Upon a subsequent application by the wife that the intervener should give security for her costs of the intervention :—

Held, reversing the decision of the President, that there was no jurisdiction to make such an order. GILROY *v.* GILROY (HARRIS INTERVENING) - - - - - **C. A. 122**

11. —— *Wife's Petition — Decree Nisi — Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31 — *Discretion — King's Proctor's Intervention—False Answers given by Petitioner at the Original Hearing and Material Facts not disclosed—Practice laid down for Guidance in Future Cases.*

The Court (Bargrave Deane J.), exercising in special circumstances the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857, in favour of the petitioner (wife), wished it to be clearly understood that in future it would not be exercised where a petitioner was shewn to have given wilfully perjured evidence and to have withheld from the Court material facts in relation to misconduct committed by the petitioner. HAMPSON *v.* HAMPSON (THE KING'S PROCTOR SHEWING CAUSE)
Bargrave Deane J. 104

—— Separation order—Adultery of wife—Liability of husband for subsequent weekly payments — Application in respect of arrears—Refusal—Appeal - - **155**
See HUSBAND AND WIFE. 3.

DOCK—Collision—Steam vessel coming out of dock in the Mersey — Steam vessel moving in the river—Rules of good seamanship - - - - - **40**
See SHIPPING. 7.

DOCUMENTS—Divorce — Practice — Order for affidavit of documents to be filed by guardian ad litem - - - **110**
See DIVORCE. 4.

DUM CASTA ET SOLA VIXERIT — Divorce—Dissolution of marriage—Variation of settlements—Allowance to guilty wife
See DIVORCE. 9. **240**

ESTOPPEL — Divorce — Decree — Permanent maintenance — Consent order—Power to vary - - - - - **245**
See DIVORCE. 2.

EVIDENCE—Divorce—Wife's petition—Decree nisi — Discretion — King's Proctor's intervention—False answers given by petitioner at the original hearing, and material facts not disclosed—Practice laid down for guidance in future cases *See* DIVORCE. 11. **104**

—— Prize Court—Evidence admissible in prize cases - - - - - - - **265**
See PRIZE COURT. 1.

—— Unstamped document—Admissibility **274**
See DIVORCE. 3.

FALSE ANSWERS—Divorce—Practice - **104**
See DIVORCE. 11.

FEES—Counsel's fees — Honorarium and not debt—Garnishee order—Invalidity **157**
See COUNSEL.

FISHING VESSEL — Coast fishing vessel — Immunity from capture - - **265**
See PRIZE COURT. 1.

FOG—Shipping—Collision—Compulsory pilotage —Navigation in fog—English pilot—Foreign crew—Interference with pilot —Assistance from ship's officers - **94**
See SHIPPING. 2.

FOREIGN SHIP — Shipping —Collision—Single foreign ship and squadron of warships —Crossing rule—Board of Trade Notice to Mariners, 1897 - - - **84**
See SHIPPING. 6.

FOREIGN VESSEL—Prize Court.
See under PRIZE COURT.

FORFEITURE—Probate—Legatee convicted of manslaughter of testator — Forfeiture of right to take under will — Public policy - - - - - - - **1**
See PROBATE. 2.

GARNISHEE ORDER—Counsel's fees—Honorarium and not debt—Invalidity **157**
See COUNSEL.

GERMANY—Prize Court.
See under PRIZE COURT.

GUARDIAN AD LITEM—Divorce—Practice—Order for affidavit of documents to be filed by guardian ad litem - - **110**
See DIVORCE. 4.

HAGUE CONVENTION, 1907, No. 6, arts. 1, 2
See PRIZE COURT. 2. **212**

—— **No. 6, art. 3** - - - - - - **218**
See PRIZE COURT. 4.

—— **No. XI., art. 3** - - - - - - **265**
See PRIZE COURT. 1.

HUSBAND AND WIFE—*Aggravated Assault—Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 43—*Conviction insufficiently describing Offence — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 8—*Separation order—Appeal.*

A husband having been convicted by justices of an aggravated assault upon his wife within the meaning of s. 43 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), was there and then served with a summons, under s. 8 of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), returnable at once, and the justices thereupon made an order for a separation :—

Held, that there was no appeal to this Court from the conviction, and that the appeal under s. 11 of the Act of 1895 against the separation order failed and must be dismissed with costs. BRYANT *v.* BRYANT - - - **Div. Ct. 277**

2. —— *Husband's Appeal—Effect of Withdrawal of Previous Summons—Technical Objection taken in Court below — Appeal allowed—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

An order of justices permitting a summons under the Summary Jurisdiction (Married Women) Act, 1895, to be withdrawn does not, where such withdrawal was conditional, dispose of the right of a wife on similar facts to take further proceedings. HOPKINS *v.* HOPKINS **Div. Ct. 282**

3. —— *Separation Order — Adultery of Wife—Liability of Husband for subsequent Weekly Payments—Application in respect of Arrears—Refusal — Appeal — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 7, 9, 11.

The decision of a Court of summary jurisdiction upon an information or complaint by a married woman alleging that payments due to her from her husband under an order made under the Summary Jurisdiction (Married Women) Act, 1895, are in arrear is not a matter in respect of which an appeal lies under s. 11 of that Act to the Probate, Divorce, and Admiralty Division.

Ruther v. *Ruther* [1903] 2 K. B. 270 followed. ADAMS *v.* ADAMS - - **Div. Ct. 155**

—— Divorce.
See under DIVORCE.

—— Summary Jurisdiction (Married Women) Act, 1895—Desertion - - - **274**
See DIVORCE. 3.

INTERVENTION—Divorce—Liability of intervener to give security for wife's costs—Jurisdiction - - - - **122**
See DIVORCE. 10.

JOINT TENANCY — Probate—Mutual wills — Joint tenancy of leasehold property—Severance — Will revocable — Subsequent will pronounced for - - **192**
See PROBATE. 3.

JUDGMENT DEBT — Counsel's fees—Honorarium and not debt—Non-liability to attachment in hands of solicitor — Garnishee order—Invalidity - **157**
See COUNSEL.

JUDICATURE ACT—Supreme Court of Judicature Act, 1891, s. 4 - - - 212
See PRIZE COURT. 2.

JURISDICTION—Divorce.
See under DIVORCE.

—— Prize Court.
See under PRIZE COURT.

—— Service out of the jurisdiction—Divorce 53
See DIVORCE. 8.

—— Summary Jurisdiction (Married Women) Act, 1895—Aggravated assualt—Separation order—Appeal - - - 277
See HUSBAND AND WIFE. 1.

—— Summary Jurisdiction (Married Women) Act, 1895—Husband's appeal—Effect of withdrawal of previous summons—Technical objection taken in Court below—Appeal allowed - - 282
See HUSBAND AND WIFE. 2.

—— Summary Jurisdiction (Married Women) Act, 1895—Desertion - - - 274
See DIVORCE. 3.

JUSTICES — Summary Jurisdiction (Married Women) Act, 1895 - - - 282
See HUSBAND AND WIFE. 2.

KING'S PROCTOR—Divorce—Wife's petition—Discretion — King's Proctor's intervention - - - - - - 104
See DIVORCE. 11.

LEASEHOLD PROPERTY — Probate — Mutual wills—Joint tenancy of leasehold property — Severance — Will revocable—Subsequent will pronounced for - 192
See PROBATE. 3.

LEGACY.
See under WILL.

LIGHTER—Damage to cargo—Breach of contract — Unseaworthy lighter — "Shipper's risk" - - - - - - 9
See SHIPPING. 1

LONDON—Declaration of London, arts. 55, 56, 57 - - - - - - - 251
See PRIZE COURT. 3.

MAINTENANCE — Divorce — Decree — Permanent maintenance—Consent order—Power to vary—Estoppel - - 245
See DIVORCE. 2.

MANSLAUGHTER — Probate — Legatee convicted of manslaughter of testator—Forfeiture of right to take under will—Public policy - - - - - 1
See PROBATE. 2.

MARITIME CONVENTIONS ACT, 1911, s. 1
See SHIPPING. 8. 25

—— **s. 1; s. 9, sub-s. 4** - - - - 141
See SHIPPING. 9.

MARRIAGE—Dissolution—Divorce.
See under DIVORCE.

MARRIED WOMEN.
See under HUSBAND AND WIFE.

MATRIMONIAL CAUSES.
See under DIVORCE.

MATRIMONIAL CAUSES ACT, 1857, s. 31
See DIVORCE. 5, 11. 100, 104

MATRIMONIAL CAUSES ACT, 1884. - 201
See DIVORCE. 6.

MATRIMONIAL CAUSES ACT, 1907, s. 1 sub-ss. 1, 2 - - - - - - 245
See DIVORCE. 2.

MERCHANT SHIPPING—Prize Court.
See under PRIZE COURT.

MERSEY—Collision—Steam vessel coming out of dock in the Mersey—Steam vessel moving in the river — Rules of good seamanship - - - - - 40
See SHIPPING. 7.

MORTGAGE—Prize Court — Claims of shareholders, necessaries men, and mortgagees—Bounty of Crown - - 218
See PRIZE COURT. 4.

MUTUAL WILLS—Probate—Joint tenancy of leasehold property — Severance — Will revocable—Subsequent will pronounced for - - - - - - - 192
See PROBATE. 3.

NEGLIGENCE — Shipping — Collision—Defence of compulsory pilotage with denial of negligence—Costs - - - 4
See SHIPPING. 5.

NEUTRAL RIGHTS—Prize Court.
See under PRIZE COURT.

NULLITY—Suit for—Practice—Order for affidavit of documents to be filed by guardian ad litem - - - 110
See DIVORCE. 4.

OFFENCES AGAINST THE PERSON ACT, 1861, s. 43 - - - - - - - 277
See HUSBAND AND WIFE. 1.

OFFENSIVE PARAGRAPH — Will — Omission from probate—Practice - - 153
See PROBATE. 4.

PAYMENT—Restitution of conjugal rights—Non-compliance with decree — Principles governing order for periodical payments - - - - - 201
See DIVORCE. 6.

PETITION—Divorce.
See under DIVORCE.

PILOT—Salvage—Claim by compulsory pilot to rank as a salvor - - - - 146
See SHIPPING. 10.

PILOTAGE — Collision—Compulsory pilotage—Navigation in fog — English pilot — Foreign crew—Interference with pilot —Assistance from ship's officers - **94**
See SHIPPING. 2.

—— Shipping — Collision — Defence of compulsory pilotage with denial of negligence—Costs - - - - - **46**
See SHIPPING. 5.

PRACTICE—Costs.
See under COSTS.

—— Divorce.
See under DIVORCE.

—— Service.
See under SERVICE.

PRIZE COURT—*Fishing Vessel—Coast Fishing Vessel—Immunity from Capture—Hague Convention*, 1907, *No. XI., art.* 3—*Non-exemption of Deep-sea Fishing Vessel—Evidence admissible in Prize Cases — Prize Court Rules*, 1914, *Order XV.*

By art. 3 of the Hague Convention, No. XI., 1907, relative to certain restrictions on the exercise of the right of capture in maritime war, "vessels employed exclusively in coast fisheries . . . . together with their appliances, rigging, tackle, and cargo, are exempt from capture"; but (apart from the question whether, in the existing war between Great Britain and Germany, the latter Power can rely upon the Convention) this immunity from capture will not extend to a German deep-sea fishing vessel engaged in a commercial enterprise forming part of the trade of the enemy country.

Under the Prize Court Rules, 1914, Order XV., a Prize Court is not bound to require the best official evidence of a capture, but may in its discretion make use of other information. THE "BERLIN" - **Sir Samuel Evans, President 265**

2. —— *Jurisdiction of High Court—Supreme Court of Judicature Act*, 1891 (54 *&* 55 *Vict. c.* 53), *s.* 4 — *Outbreak of Hostilities — Hague Convention*, 1907, *No.* 6, *arts.* 1, 2—*Detention of German Vessel pending Further Order—Sufficiency of Affidavit of Shipowner.*

By art. 1 of the Hague Convention, 1907, No. 6, relative to the status of enemy merchant ships at the outbreak of hostilities, it is stated to be desirable that such a ship belonging to one of the belligerent Powers in an enemy port should be allowed to depart within a reasonable number of days of grace, and by art. 2 if, owing to circumstances beyond her control, the merchant ship has been unable to leave the enemy port within that period, or has not been allowed to leave, the vessel may not be confiscated but merely detained.

A German vessel arrived at the East Bute Dock, Cardiff, on August 4, 1914, some hours before the outbreak of hostilities between Great Britain and Germany. She was, on the following day, detained by the Collector of Customs, and a writ was subsequently issued by the Procurator-General for her condemnation:—

Held, by the President (Sir Samuel Evans), that the vessel was properly seized by the officers

PRIZE COURT—*continued.*

of the Crown, but in view of the difficulty of ascertaining whether any days of grace had been agreed upon by Germany, the vessel would, on the application of counsel for the Crown, be detained by the marshal until further order, with liberty to apply and all questions of costs reserved.

Held, further, that the affidavit filed by the agents of the owners was insufficient in not setting out any grounds shewing a temporary suspension of the hostile character of the owners and entitling them to appear in the proceedings. THE "CHILE" - **Sir Samuel Evans, President 212**

3. —— *Nationality of Ship—Flag—Transfer in transitu—Registration—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 1—*English Company consisting of Alien Enemy Shareholders —Effect of War imminent or actual—Declaration of London, arts.* 55, 56, 57—*Detention of German Vessel.*

On the day war was declared between Germany and Russia (August 1, 1914), an English company wired to a German company accepting an offer to sell to the English company two vessels belonging to the German company then on the high seas, and flying the German flag. On August 4 war was declared between England and Germany, and, on the next day, the vessels were detained as prizes by collectors of Customs in English ports:—

Held by the President (Sir Samuel Evans), on making an order for the detention of the two vessels, that (1.) the nationality of a vessel is determined by the flag she is entitled to fly, and at the time of seizure that flag was German; (2.) that the alleged transfer in transitu was invalid, as mere communications, which may suffice to bind the parties, are insufficient to change the ownership of the property as against captors, whether imminent or actual belligerents; and (3.) though an English company, registered in this country under the Companies Acts, has a separate entity and can own a ship, query whether a company, nominally English, but consisting (as in this case) entirely of aliens, can own a British vessel. THE "TOMMI." THE "ROTHERSAND" - **Sir Samuel Evans, President 251**

4. —— *Neutral Rights under Enemy Flag—Status of Enemy Merchant Ships at Outbreak of Hostilities—Hague Convention*, 1907, *No.* 6, *art.* 3—*Claims of Shareholders, Necessaries Men, and Mortgagees—Bounty of Crown.*

A vessel flying the German flag left her last port of departure some hours before the declaration of war between Great Britain and Germany, and was encountered and captured by a British cruiser on the high seas while still ignorant of the outbreak of hostilities:—

Held by the President (Sir Samuel Evans), that as Germany had not reciprocally accepted the terms of art. 3 of the Hague Convention, 1907, No. 6, the vessel could be condemned and sold by a British Prize Court and not merely conditionally detained.

The vessel at the time of her capture, though in the possession of her owners, a German limited

PRIZE COURT—*continued.*

liability company, was subject to a bona fide mortgage to a Dutch company domiciled at Dordrecht, and it was claimed that, as, according to German law, some kind of "property" in the vessel had passed to the mortgagees, the Crown should, out of the moneys realized by the sale of the vessel, apply such portion of it as would meet the mortgage :—

Held by the President, that upon the authorities, upon principle, and upon grounds of convenience and practice, the claim of the neutral mortgagees of the captured vessel must be rejected, and that the same conclusion would be arrived at if the claim were by British subjects; but the Crown being entitled to captured property could, out of its bounty, deal favourably with such claims.

Held, further, that the affidavit filed by agents on behalf of the German owners of the vessel was, as in the case of *The "Chile"* ([1914] P. 212), insufficient to shew any right for enemy owners to put forward a claim, for it failed to indicate that the hostile character of the owners had been, in the circumstances, in any way suspended, and, therefore, the appearance of the German owners of the vessel would be struck out, and the appearances entered by separate shareholders would not avail them as they had taken shares in respect of a vessel with an alien flag; but as regarded neutrals and British subjects, it was open to the Crown to exercise the prerogative of bounty, a prerogative which could also be applied to those who had appeared on the ground of having advanced money for necessaries, &c. THE "MARIE GLAESER" - **Sir Samuel Evans, President 218**

PRIZE COURT RULES, 1914, Order XV. - 265
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PROBATE —*Costs—Conduct leading to Investigation—Rules of the Supreme Court, Order* LXV., *r.* 14D—*Power of Court—Costs of all Parties ordered to come out of Legacies of Successful Parties—Practice.*

The principle of law is well established that if a person who takes a benefit under a testamentary document has been instrumental in obtaining the preparation or execution of the document, this is a circumstance that ought generally to excite the suspicion of the Court and should call upon it to be vigilant and jealous in examining the evidence adduced in support of the claim to establish the document, which ought not to be pronounced for unless the suspicion attaching to it is removed and the Court is judicially satisfied that the document propounded does express the true will of the deceased; and it follows from this that those who are instrumental in bringing about the inquiry are not wholly in the wrong, even if they do not succeed in their impeachment.

Order LXV., r. 14D, gives the Court full power to order that the costs of all parties shall come out of the legacies bequeathed by a testamentary document to the persons whose conduct, though unsuccessfully impeached, has been the real cause of the investigation. IN THE ESTATE OF OSMENT. CHILD AND JARVIS *v.* OSMENT. **Sir Samuel Evans, President 129**

PROBATE—*continued.*

2. —— *Legatee convicted of Manslaughter of Testator—Forfeiture of Right to take under Will —Public Policy.*

The principle according to which a person who is guilty of feloniously killing another cannot take any benefit under that other person's will is based on public policy, and applies equally to a case of manslaughter as to one of murder.

A legatee who had been convicted of the manslaughter of her testator was held to be rightly dismissed from an action for probate of the will.

Cleaver v. Mutual Reserve Fund Life Association [1892] 1 Q. B. 147 followed.

Such an order may properly be made upon an interlocutory proceeding.

Dyson v. Attorney-General [1911] 1 K. B. 410 distinguished. IN THE ESTATE OF HALL. HALL *v.* KNIGHT AND BAXTER - - **C. A. 1**

3. —— *Mutual Wills—Joint Tenancy of Leasehold Property—Severance—Will revocable —Subsequent Will pronounced for.*

A husband and wife, joint tenants of leasehold properties, executed mutual wills in 1907, the clear arrangement between them being that those wills were to be irrevocable.

The husband died in 1911, and his will was proved.

In 1912 the wife executed a codicil to her will, and, in 1913, she executed a fresh will. These later documents were executed by the wife in breach of a definite arrangement between herself and her husband in 1907 when their mutual wills were executed :—

Held, that the agreement or arrangement between the husband and wife to execute the mutual wills, and the execution of those wills, severed the joint tenancy in the properties in question and created a tenancy in common.

In the Goods of Joseph Raine (1858) 1 Sw. & Tr. 144 disapproved and not followed.

Held, further, that the will of 1907 was revocable, and that the will of 1913 should prevail as the true last will of the deceased (widow). IN THE ESTATE OF HEYS. WALKER *v.* GASKILL **Sir Samuel Evans, President 192**

4. —— *Practice — Will — Offensive Paragraph—Omission from Probate.*

Although it is not competent to the Court to strike out or expunge any part of a will merely because it contains objectionable matter, the Court may, nevertheless, order the omission from the probate of words in the will which are scandalous and defamatory and which do not affect any testamentary disposition or appointment contained in the will. IN THE ESTATE OF WHITE - - - **Bargrave Deane J. 153**

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SETTLEMENT—Divorce — Variation of settlements — Allowance to guilty wife — Dum casta et sola vixerit - - **240**
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SEVERANCE—Probate — Mutual wills — Joint tenancy of leasehold property—Severance—Will revocable—Subsequent will pronounced for - - - - **192**
See PROBATE. 3.

SHIPPING—*Bill of Lading—Damage to Cargo —Breach of Contract—Through Bill of Lading — Transhipment — Unseaworthy Lighter — "Shipper's Risk"—"Ship's Expense"—Shipowner's Liability.*

The plaintiffs shipped a parcel of machinery at New York on board the defendants' steamship to be carried to Hull, and there transhipped into another of the defendants' steamships, or other company's steamship, for carriage from Hull to Norrköping in Sweden. The through bill of lading contained, amongst other conditions, the following:—"To be delivered in like good order and condition at the port of Hull. To be thence transhipped at ship's expense and shipper's risk to the port of Norrköping." "It is mutually agreed that the carrier shall have liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods. That the carrier shall not be liable . . . . for risk of craft, hulk, or transhipment," and "The goods are subject to any further clauses in the bills of lading in use by the route beyond Hull and the liability of each carrier is limited to its own line."

The goods arrived in good order by the defendants' steamship at Hull, and were there placed in a lighter whilst waiting to be transhipped to another of the defendants' steamships for conveyance to Norrköping. The lighter proved to be unseaworthy and sank with the plaintiffs' goods:—

Held by the Court of Appeal (Lord Parker of Waddington, Lord Sumner, and Warrington J.), affirming the decision of Bargrave Deane J., that the defendants were liable to make good to the plaintiffs the loss they had sustained by the sinking of the lighter through unseaworthiness, the question being one of the construction of the through bill of lading, and the words "at shipper's risk" referred to other risks than that of a breach of the fundamental obligation of the shipowner in respect of seaworthiness. THE "GALILEO" - - - - - - **C. A. 9**

2. —— *Collision — Compulsory Pilotage — Navigation in Fog — English Pilot — Foreign Crew—Interference with Pilot—Assistance from Ship's Officers.*

During a fog, two steam vessels came into collision in the river Humber, and were found by Bargrave Deane J. equally to blame for (inter alia) excessive speed; but exemption from liability was claimed by the owners of one of the vessels on the ground that she was in charge of a pilot by compulsion of law. The vessel was foreign and reports in the Swedish language of whistles were received on the bridge from the look-out forward; but were apparently unheeded by the English pilot:—

Held, that the plea of compulsory pilotage failed, for, though, in the absence of manifest incapacity, a pilot should not be interfered with, it was the duty of the ship's officers to take care that the reports received from forward were understood by the pilot, and that his attention was drawn to the fact that, in the circumstances, the speed he was maintaining on the vessel was a breach of the international regulations for preventing collisions at sea. THE "APE"
Bargrave Deane J. 94

3. —— *Collision — Damage — Repairs — Strike of Workmen — Loss of Use of Vessel — Proximate Cause — Natural and probable Consequence—Remoteness.*

By reason of a collision, due to the negligence of those in charge of another vessel, the plaintiffs' vessel was obliged to go into dry dock to repair the damage sustained, and, whilst there, delay occurred owing to a strike of workmen. On objection, on the ground of remoteness, to the allowance by the registrar of an item in the plaintiffs' claim in respect of this delay:—

Held by the President (Sir Samuel Evans), that the item, covering the loss of the use of the vessel during the period of the strike, was properly allowed in accordance with the principles of the common law, for the loss flowed directly, naturally, and in the usual or ordinary course of things from the proximate cause, namely, the negligence of the defendants in bringing about a collision with the plaintiffs' vessel, and thereby rendering it necessary to dry-dock her for the purpose of repair. H.M.S. "LONDON" - **Sir Samuel Evans, President 72**

4. —— *Collision—Loss of Submarine—Loss of Life—Assessment of Damage—Alteration of Finding of Registrar and Merchants as to Amount only—Pensions and Grants to Relatives of deceased Officers and Seamen.*

In an action of damage by collision, brought by the plaintiffs, the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, against the defendants, the owners of a German steamship, the damages occasioned to the plaintiffs by reason of the collision between a submarine and the steamship were referred to the registrar assisted by merchants to assess the amount thereof on the basis of the defendants paying 95 per cent. of the assessed damages.

By the schedule to the assistant registrar's report the amount (item 1) claimed in respect of the "value of the hull, machinery, and electric fittings and batteries of the submarine at the time of her loss" was 35,000*l.*, of which 26,500*l.* was allowed. Under item 9 the sum claimed in respect of "capitalized amount of pensions and grants paid or payable by the plaintiffs to the relatives of the crew who were drowned" was 5140*l.* provisionally assessed at 4100*l.*, the whole of which was disallowed.

On motion by the defendants to vary the report in respect of item 1, on the ground that the sum of 26,500*l.* was excessive, the President reduced the amount to 23,850*l.* On cross-motion by the plaintiffs to vary the report by allowing item 9 on the ground that the amount (4100*l.*) was recoverable at law, the President confirmed the report, holding that, apart from statute, damages could not be recovered for negligence causing the loss of human life. Both the plaintiffs and the defendants appealed:—

Held by the Court of Appeal (Buckley L.J., Kennedy L.J., and Scrutton J.) that, with regard to item 1, the sum of 26,500*l.* must stand, as it was arrived at by the assistant registrar and merchants upon evidence produced by both sides, and was varied by the President only upon the question of quantum; and an appellate tribunal

does not review a figure so found unless under very exceptional circumstances, such as the detection of an error of principle, or an obvious mistake in the calculation, or a clear misunderstanding of evidence lying at the root of the assessment.

As to item 9, the Court held that the effect of the decisions in *Osborn* v. *Gillett* (1873) L. R. 8 Ex. 88; *Clark* v. *London General Omnibus Co.* [1906] 2 K. B. 648; and *Jackson* v. *Watson & Sons* [1909] 2 K. B. 193, was to render binding upon the Court of Appeal the ruling of Lord Ellenborough in *Baker* v. *Bolton* (1808) 1 Camp. 493, that "in a civil court, the death of a human being could not be complained of as an injury"; and the law, as to the damages not being recoverable, must be reviewed, if at all, in the House of Lords. THE "AMERIKA"

C. A. 167

5. —— *Collision — Practice — Defence of Compulsory Pilotage with Denial of Negligence —Costs.*

In an action of damage by collision the defendants pleaded inevitable accident, and, alternatively, that if (which was denied) the collision and damage were caused or contributed to by any negligence on the part of any one on board their steamship, such negligence was solely that of a duly licensed pilot who was in charge of their vessel within a district in which the employment of a pilot was compulsory by law. Bargrave Deane J. found that the collision was occasioned by the fault of the pilot alone and dismissed the plaintiffs' action; but made no order as to costs. The defendants, by leave, appealed on the ground that the learned judge, in the exercise of the judicial discretion vested in him under the Judicature Act, should, according to the alleged existing admiralty practice, have given the defendants the costs of defending the action:—

The Court of Appeal (Lord Parker of Waddington, Lord Sumner, and Warrington J.) declined to lay down any general rule for the guidance of Courts of first instance beyond what had already been done by the Court of Appeal, namely, that, if there be but one issue in the action, the successful party is, prima facie, entitled to costs, as where the defence of compulsory pilotage is the only issue raised; but where, as in the present case, the defendants undertake to prove that there was no faulty navigation on the part of anybody, and fail, though succeeding upon the issue of compulsory pilotage, the Court below will be rightly exercising its discretion, apart from special circumstances, in making no order as to costs. THE "OPHELIA" - - - - - **C. A. 46**

6. ——*Collision—Single Foreign Ship and Squadron of Warships—Crossing Rule—Board of Trade Notice to Mariners,* 1897— *Regulations for Preventing Collisions at Sea, arts.* 19, 21, 27.

Those in charge of a Spanish merchant vessel proceeding up the North Sea, in fine clear weather, at about seven knots on a course of N. 21° W., observed a squadron of warships about a mile distant drawing up on the port quarter on a more easterly course and at greater speed.

The Spanish vessel kept her course and speed, under art. 21 of the international regulations for preventing collisions at sea, and the nearest war vessel passed safely across her bows; but, in spite of an effort by the Spanish vessel at the last moment to avoid collision, the second warship of the squadron struck the Spaniard a heavy blow and sank her. The owners of the Spanish vessel charged the defendant, the navigating officer of the second warship, with (inter alia) failing to keep out of the way under the King's Regulations equivalent to art. 19 of the international regulations, whilst the defendant mainly relied on the Spaniard's non-compliance with the rule of good seamanship embodied in the notice issued by the Board of Trade in 1897, by which those in charge of single ships are warned not to approach a squadron of warships so closely as to involve risk of collision :—

Held by the President (Sir Samuel Evans), that the defendant was alone to blame, as he knew that the plaintiffs' vessel was foreign, and that the King's Regulations equivalent to art. 19 applied, whilst those in charge of the Spanish vessel did not know, and could not be taken to know, of the Board of Trade notice to mariners. They, therefore, were justified in keeping their course and speed under art. 21 of the international rules. H.M.S. "KING ALFRED."

Sir Samuel Evans, President 84

7. —— *Collision—Steam Vessel coming out of Dock in the Mersey—Steam Vessel moving in the River—The Crossing Rule (art. 19) of the Regulations for Preventing Collisions at Sea—Rules of Good Seamanship.*

Although the crossing rule (art. 19) of the regulations for preventing collisions at sea applies in the Mersey when there is risk of collision between a steam vessel coming out of dock and a steam vessel moving in the river, there will, from the necessity of the case, be a time before the application of the rule becomes possible, and, during that time, those in charge of each vessel must be guided in their navigation by the rules of good seamanship.

The "Sunlight" [1904] P. 100 considered. THE "LLANELLY" - - - **Div. Ct. 40**

8. —— *Collision—Tug and Tow—Tow and Third Ship in Collision—Tug and Third Ship to blame—Division of Loss—Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1.

In an action of damage, brought by the owners of a barge against the owners of a steamship, and the owners of a tug, which had the barge in tow, in respect of a collision between the steamship and the barge, the steamship and the tug were found to blame in equal degree, and the owners of the steamship having paid the owners of the barge the amount of the damage sustained by the barge, they included the amount in their claim against the owners of the tug :—

Held by the Court of Appeal (Lord Parker of Waddington, Lord Sumner, and Warrington J.), affirming the decision of the President (Sir Samuel Evans), that the case was not governed by the common law rule as to no contribution between joint tortfeasors, and, therefore, applying the principles laid down by s. 1 of the Maritime Conventions Act, 1911, the owners of the steamship were entitled, as against the owners of the tug, to half the amount of the damage sustained by the steamship, including therein half the amount of the damage sustained by the barge. THE "CAIRNBAHN" - **C. A. 25**

9. —— *Collision between Steamship and laden Barge in tow of Tug—Steamship and Tug to blame—Damage—Claim by Owner of Cargo on Barge—Division of Loss—Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1 ; *s.* 9, *sub-s.* 4.

A steamship and a dumb barge, in tow of a tug, came into collision in the river Thames, and the cargo of tea laden on the barge sustained damage.

The owners of the tug were, for the time being, owners of the barge, and they, with the owners of the cargo laden on the barge, brought an action of damage against the owners of the steamship, who counterclaimed against the owners of the tug.

The Court found that the collision between the steamship and the barge was due to the fault of the steamship and of the tug, and that —in accordance with the provisions of the Maritime Conventions Act, 1911. s. 1 and s. 9, sub-s. 4 —the liability to make good the damage or loss should be in the proportion of three-fourths to one-fourth ; but the owners of cargo on board the barge claimed, as innocent parties, to recover the whole of their damage from the owners of the steamship :—

Held by the President (Sir Samuel Evans), that as the tug controlled the navigation of the barge, and both the tug and the barge were in charge of the servants of the owners of the tug, by whose fault the damage was in part caused, the principle laid down in *The "Milan"* (1861) Lush. 388 applied, and, therefore, the owners of the cargo could only recover from the owners of the steamship three-fourths of their damage.

The "Devonshire" [1912] A. C. 634 distinguished. THE "UMONA"

Sir Samuel Evans, President 141

10. —— *Salvage—Claim by Compulsory Pilot to rank as a Salvor.*

The defendants' steamship, on a voyage from the Tyne to Marseilles, lost her propeller in the neighbourhood of the Royal Sovereign lightship, and, drifting up channel, was brought to anchor off Rye after bumping several times ; but without sustaining material damage. In answer to flares the Winchelsea lifeboat went out to her, and then a tug, which came up, was sent to fetch another tug. The two tugs, with the assistance, later on, of a third, proceeded to tow the vessel up channel, and, off Dungeness, a compulsory pilot boarded her, and took charge of the vessel to Gravesend.

The defendants admitted that salvage services had been rendered by the three tugs and by the crew of the lifeboat ; but denied the right of the pilot to claim remuneration on salvage terms :—

Held by the President (Sir Samuel Evans), that the claim of the pilot must be disallowed, but, in the circumstances, without costs, for

SHIPPING—*continued.*
though the vessel was disabled, and, in consequence, sheered heavily in the bad weather prevailing, and, whilst in charge of the pilot, the hawser of one of the tugs fouled an anchor of the defendants' vessel, and there was some apprehension of risk from leakage, still the pilot had not been required to do, and had not in fact done, anything more than ought to be done by a pilot performing his ordinary pilotage work for pilotage reward.

It is not in the interests, either of shipowners and their navigating servants, or of the pilots themselves, to give any countenance to the idea that a pilot, compulsorily in charge of a disabled vessel, may easily convert himself into a salvor. THE "BEDEBURN"
Sir Samuel Evans, President 146

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